

STATE OF MICHIGAN
in the
MICHIGAN SUPREME COURT

TERI ROHDE, BRENDON QUILTER, MARY
QUILTER, WALTER MACKEY, BARBARA
MACKEY, GARY GIBSON, ELLEN GIBSON,
TED JUNGKUNTZ, LOISE JUNGKUNTZ,
DAVID SPONSELLER, MARY SPONSELLER,
MIKE GLADIEUX, MARTHA GLADIEUX,
HELEN RYSSE, TERRY TROMBLEY, JOHN
WILLIAMS, and THERESE WILLIAMS,

Plaintiffs-Appellants,

v V

ANN ARBOR PUBLIC SCHOOLS a/k/a PUBLIC
SCHOOLS OF THE CITY OF ANN ARBOR,
BOARD OF EDUCATION FOR ANN ARBOR
PUBLIC SCHOOLS, PRESIDENT OF THE
BOARD OF EDUCATION FOR ANN ARBOR
PUBLIC SCHOOLS, and TREASURER OF THE
BOARD OF EDUCATION FOR ANN ARBOR
PUBLIC SCHOOLS,

Defendants-Appellees,

and

ANN ARBOR EDUCATION ASSOCIATION,
MEA/NEA,

Intervening Defendant-Appellee.

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No. 253565
Washtenaw Circuit Court
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D. Swartz

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**PLAINTIFFS/APPELLANTS' APPLICATION FOR LEAVE TO APPEAL
TO THE MICHIGAN SUPREME COURT PURSUANT TO MCR 7.302(B)(1)-(3).**

Plaintiffs/Appellants (referred to collectively herein as Rohde), hereby request that this Supreme Court grant their Application For Leave To Appeal in order to resolve issues of law vitally important to the public interest and jurisprudence of this state. First, the circumstances under which taxpayers of this state can avail themselves of the statutory authority to prevent unlawful expenditures of public funds by political subdivisions of this state pursuant to MCL 129.61. Second, and more fundamentally, Rohde ask this Supreme Court to resolve a question vitally important to the protection of marriage provided by the constitution and laws of this state, i.e., whether political subdivisions of the State of Michigan, such as Ann Arbor Public Schools (AAPS), have authority to define, recognize, and subsidize same-sex "domestic partnerships" when Michigan's constitution and statutory law prohibit the recognition of same-sex marriages.

This Court should render a decision that such policies are contrary to state law before more public funds are unlawfully expended or other public officials take further actions prejudicial to state law governing marriage. In so doing, this Court will act “to secure and preserve the benefits of marriage for our society and for future generations of children,” the stated purpose of the Article I, §25 of our state constitution and, likewise, vindicate the judgment of the people that marriage is “inherently a unique relationship between a man and a woman” such that “this state has a special interest in encouraging, supporting and protecting that unique relationship.” MCL §551.1.

CONTENTS OF THE APPLICATION

	Page
Statement Of Issues Presented	ii
Outline of The Argument	iii
Order Appealed From And Relief Requested	iv
Statement of Jurisdiction And Grounds For Review	vi
Table of Exhibits.	viii
Table of Authorities	ix

STATEMENT OF ISSUES PRESENTED

- I. Do The Plaintiffs Have Standing To Challenge AAPS’
“Domestic Partnership” Benefits Policy?

The Plaintiffs/Appellants Answer: Yes.

The Defendants/Appellees Answer: No.

The Intervener-Defendants/Appellees Answer: No.

The Court of Appeals Ruled: No.

- II. Is AAPS’ “Domestic Partnership” Policy Defining, Recognizing, And Subsidizing
Same-Sex “Domestic Partnerships” Unlawful?

The Plaintiffs/Appellants Answer: Yes.

The Defendants/Appellees Answer: No.

The Intervener-Defendants/Appellees Answer: No.

The Court of Appeals: Declined To Reach The Merits.

OUTLINE OF THE ARGUMENT

INTRODUCTION	1
FACTUAL AND PROCEDURAL BACKGROUND	2
LAW AND ARGUMENT	8
I. The Plaintiffs/Appellants Have Standing To Challenge AAPS’ “Domestic Partnership” Benefits Policy Under The Plain Language Of MCL 129.61.	11
II. AAPS’ Policy, Defining, Recognizing, And Subsidizing Same-Sex “Domestic Partnerships” Is Unlawful And Results In An Unlawful Expenditure Of State Funds.	11
A. AAPS’ Policy Defining, Recognizing, And Subsidizing Same-Sex “Domestic Partnerships” Is Unlawful Because It Is Contrary To Article I, §25 of the Michigan Constitution.	12
B. AAPS’ Policy Defining, Recognizing, And Subsidizing Same-Sex “Domestic Partnerships” Is Contrary To State Law	14
1. AAPS Has No Power To Define, Recognize, And Subsidize “Domestic Partnerships” In Connection With Its Administration Of The Public Schools Because The Field of Domestic Relations Is Occupied By The State.	17
2. AAPS’ Policy Defining, Recognizing, And Subsidizing “Domestic Partnerships” Is Unlawful Because It Conflicts With State Law Prohibiting The Recognition of Same-Sex Marriages.	20
CONCLUSION	24

ORDER APPEALED FROM AND RELIEF REQUESTED

Appellants/Applicants (referred to collectively herein as “Rohde”) hereby make application for leave to appeal to this Supreme Court from the opinion and of the Michigan Court of Appeals entered on April 14, 2005, affirming the order dismissing her claim entered on December 30, 2003 in the Circuit Court for Washtenaw County by the Honorable David S. Swartz. Rohde requests the this Supreme Court grant her application for leave to appeal and, upon the conclusion of these proceedings, enter an opinion and order granting her the following relief:

1. A decision confirming that she has standing to advance her claim;
2. A declaration pursuant to MCR 2.605 that AAPS’ policy, practice, and customs defining and recognizing so-called domestic partnerships, and the termination of domestic partnerships are unlawful, and that the expenditure of public funds to pay for benefits extended to the same-sex so-called domestic partners of employees of AAPS as provided for by AAPS’ policy, practice, and custom is unlawful;
3. An order requiring AAPS to account for public funds expended to provide benefits extended to the same-sex so-called domestic partners of employees of AAPS pursuant to MCL 129.61 as well as setting an amount of costs to be secured by the Plaintiffs in connection with this matter if deemed necessary by this Supreme Court; and
4. An order pursuant to MCR 3.310 enjoining AAPS from entering into any contract or taking any other step that results in the recognition of “domestic partnerships” or creates an obligation on the part of AAPS to pay monies to, or on behalf of, same-sex partners of

their employees, or results in any expenditure of public funds to pay for the provision of any benefits, including medical and other insurance benefits, to same-sex so-called “domestic partners”, except to the extent necessary to fulfill obligations arising from contracts executed prior to the entry of a judicial order barring such practices.

STATEMENT OF JURISDICTION AND GROUNDS FOR REVIEW

This Court has jurisdiction of the Rohde's Application For Leave To Appeal pursuant to MCR 7.302. Review is well grounded in MCR 7.302(B)(1)-(3). Rohde's claim involves substantial questions of Michigan law. The first question concerns the circumstances under which taxpayers may avail themselves of the statutory authority to bring suit to prevent unlawful expenditures of state funds by political subdivisions of this state, including school districts, pursuant to MCL 169.71. The second and more fundamental question concerns the force and effect of Michigan's constitution and laws governing marriage; more specifically, whether AAPS' policy of recognizing and subsidizing same-sex "domestic partnership" benefits, violates Article I, §25 of the Michigan Constitution, which provides that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose," and, relatedly, whether the statutes governing marriage turn on substance, not form, and prohibit the recognition of same-sex marriages under the guise of "domestic partnerships." See MCL 551.1; MCL 551.271; MCL 551.272.

These issues have significant public interest. The very purpose of MCL 169.71, is to authorize suits to prevent unlawful expenditures of public funds. And the very purpose of Article I, §25 is "[t]o secure and preserve the benefits of marriage for our society and for future generations of children," by prohibiting the recognition of same-sex marriages (regardless of the label used to describe the union), precisely because the institution of marriage is "inherently a unique relationship between a man and a woman" and "this state has a special interest in encouraging, supporting and protecting that unique relationship." MCL 551.1. Further, the issues presented also involves legal principles of major significance to the state's jurisprudence; for if

AAPS has authority to define, recognize, and subsidize same-sex “domestic partnerships”, then there is nothing to stop any mayor, city, or village from recognizing same-sex marriages under the guise of “domestic partnerships.” This Court should grant review in order to remove any doubt that marriage must remain, as the people of the State of Michigan have said, a unique and privileged institution based upon the unique relationship between one man and one woman.

TABLE OF EXHIBITS

Order Granting AAPS' Motion For Summary Disposition Exhibit 1

Court of Appeals Opinion Exhibit 2

TABLE OF AUTHORITIES

Constitutional Provisions

Article I, §25	1
----------------------	---

Case Law

<i>Bd. Of Ed. City of Detroit v. Michigan Bell Tel. Co.</i> , 395 Mich 1 (1975)	9
--	---

<i>Bill Johnson's Restaurants, Inc. v. NLRB</i> , 461 U.S. 731 (1983)	10
--	----

<i>Burton Township of Genesee County v. Speck</i> , 378 Mich. 213 (1966)	6
---	---

<i>Carnes v. Sheldon</i> , 109 Mich. App. 204 (1981)	15
---	----

<i>Cody v. Southfield-Lathrup</i> , 25 Mich. App. 33	9
---	---

<i>East Jackson Public Schools v. State</i> , 133 Mich. App. 132 (1984)	9
--	---

<i>Feaster v. Portage Public Schools</i> , 451 Mich. 351 (1996)	9
--	---

<i>Ford v. Wagner</i> , 153 Mich. App. 466 (1986)	15
--	----

<i>Harris v. Harris</i> , 201 Mich. App. 65 (1993)	15
---	----

<i>Howell Township v. Rooto Corp.</i> , 2003 WL 22136268 (Ct. App. 236440) (2003)	15
--	----

<i>King v. School Dist. No. 5 of Warren Tp., Macomb Cnty</i> , 261 Mich 605	9
--	---

<i>Mack v. City of Detroit</i> , 467 Mich. 186	10
---	----

<i>Metropolitan Council No. 23 v. City of Center Line</i> , 414 Mich. 642	9
<i>Michigan Coalition for Responsible Gun Owners v. City of Ferndale</i> , 256 Mich. App. 401 (2003)	15
<i>Michigan Restaurant Assoc. v. City of Marquette</i> , 245 Mich. App. 63 (2001)	15
<i>Mino v. Clio School Dist.</i> , 255 Mich. App. 60 (2003)	9
<i>People v. Llewellyn</i> , 401 Mich. 314 (1977)	8
<i>Rowley v. Garvin</i> , 221 Mich. App. 699 (1997)	9
<i>Sherman Bowling Center v. City of Roosevelt Park</i> , 154 Mich. App. 576 (1986)	16
<i>Snyder v. Charlotte Public School Dist.</i> , 421 Mich. 517	9
<i>Soupal v. Shady View, Inc.</i> , 469 Mich. 458, (2003)	7
<i>State Farm Fire & Cas. Co. v. Old Republic Ins. Co.</i> , 466 Mich. 142 (2002)	7
<i>Traxler v. Ford Motor Co.</i> , 227 Mich. App. 276 (1998)	15
 Statutes or Court Rules	
MCR 129.61	8
MCL §380.11a	15
MCL §551.1	11

MCL §551.2	12
MCL §551.3	12
MCL §551.4	12
MCL §551.5	12
MCL §551.7	12
MCL §551.14	12
MCL §551.15	12
MCL §551.16	12
MCL §551.17	12
MCL §551.18	12
MCL §551.101	12
MCL §551.102	12
MCL §551.103	12
MCL §551.271	12
MCL §551.272	12
MCL §552.1	12
MCL §552.601	13
MCL §691.1407	8

Attorney General Opinions

Attorney General, titled Opinion No. 7171	
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Other Authorities and Sources

Black's Law Dictionary	12
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INTRODUCTION

Plaintiffs/Appellants (collectively “Rohde”) filed suit against Ann Arbor Public Schools because Ann Arbor Public Schools (“AAPS”) has a policy that defines and recognizes same-sex “domestic partnerships” and uses public funds to purchase benefits for the “domestic partners” of AAPS employees. The basis for her claim is simple and straightforward: AAPS has no authority to define, recognize, and subsidize same-sex “domestic partnerships”, which are—in substance—“marriages”—when Michigan law prohibits the recognition of same-sex marriages. See Article I, §25; see also MCL §§551.1, 551.271, & MCL §551.272. In her complaint, Rohde requested a declaration that AAPS policy is contrary to Michigan law and an order enjoining AAPS from implementing its policy except to the extent necessary to fulfill existing contractual obligations. The Circuit Court dismissed her claims and the Court of Appeals affirmed that dismissal.

Rohde now requests that this Supreme Court give her leave to appeal, and ultimately, reverse the Court of Appeals and enter an order directing the Circuit Court to provide her with the relief she has requested upon remand. Truth be told, there is no question that she has standing to advance her claims under the plain language of MCL 129.61. And it is also certain that AAPS has no power to define, recognize, and subsidize same-sex “domestic partnerships” when the people of the State of Michigan have prohibited the recognition of same-sex “marriages.” For these reasons, explained further below, this Supreme Court should grant Rohde’s application and require the Circuit Court to provide the relief Rohde has requested upon the conclusion of proceedings before this court.

FACTUAL AND PROCEDURAL BACKGROUND

On September 22, 2003, Rohde filed suit against AAPS alleging that: (1) AAPS had a “domestic partnership” policy defining and recognizing same-sex “domestic partnerships” for the purpose of running the public schools in the Ann Arbor School District; (2) AAPS used public funds to provide benefits to the same-sex “domestic partners” of employees of AAPS; and (3) this policy was unlawful and resulted in an unlawful expenditure of public funds. See Amended Complaint & Docket Sheet at entries for 9/22/03 & 11/07/03. AAPS Answered the Amended Complaint. Amended Complaint & Docket Sheet at entry for 12/02/03. In the meantime, the Ann Arbor Education Association (“AAEA”) filed a motion to intervene so it could protect the interests of members receiving domestic partnership benefits, and the Court granted their motion. See AAEA Motion To Intervene And Answer & Docket Sheet at entry for 10/27/03 & 10/29/03. Transcript from Hearing Held on October 29, 2003 at 4-15.

Rohde’s Amended Complaint and AAPS’ Answer demonstrate that there is no material fact at issue in this dispute. A review of those pleadings demonstrates the following:

- Defendants AAPS and the Board have a policy, practice, and custom whereby they have defined and recognized so-called “domestic partners”, defined to mean a same-sex partner of an individual who meets certain criteria that have been established and approved by Defendants AAPS and the Board. See Amended Complaint at ¶8-10; *cf.* AAPS Answer to Amended Complaint at ¶8-10.
- Pursuant to this policy, practice and custom of Defendants AAPS and the Board, it has entered into contracts with certain employees, including individuals who are employed as teachers by AAPS. See Amended Complaint at ¶11; *cf.* AAPS Answer to Amended Complaint at ¶11.

- Pursuant to the policy, practice, and custom of Defendants AAPS and the Board, and in connection with the contracts referenced above, an employee seeking to secure benefits for a same-sex so-called “domestic partner” completes a document that is in substance the same as a document entitled “Declaration of Domestic Partnership.” That document provides that in order to qualify for “domestic partnership” benefits the employee of AAPS and “domestic partner” must declare or otherwise represent that they satisfy, in substance, the following criteria:
 - They are of the same sex;
 - One of them is an employee of the Ann Arbor Public Schools eligible for employee health benefits and the other is not;
 - They have an intimate, committed relationship, and have had this relationship for at least the past six months;
 - They share the same principal residence(s) and the common necessities of life and have done so for the past six months;
 - They agree to be responsible for each other’s basic living expenses during their domestic partnership. They also agree that anyone who is owed these expenses can collect from either of them;
 - They are both 18 years of age or older and otherwise competent to enter into a contract;
 - Neither of them is married;
 - They are not more closely related by blood than what is allowed for legal marriage;
 - Neither of them has a different partner now; and
 - They agree to notify the AAPS Fringe Benefit Office and/or Insurance Carrier immediately if their domestic partnership ends or if any of the above representations is no longer true. Amended Complaint at ¶12 & Ex. A. to the Amended Complaint; *cf.* AAPS Answer to Amended Complaint at ¶12.

- Pursuant to the policy, practice, and custom of Defendants AAPS and the Board, and in connection with the contracts referenced above, an employee seeking to remove a so-called “domestic partner” from benefits coverage must complete and sign a document that is in substance a Declaration of Termination of Domestic Partnership. See Amended Complaint at ¶13 & Ex. B to the Amended Complaint; *cf.* AAPS Answer to Amended Complaint at ¶13.
- Pursuant to the contracts between Defendants and teachers of the AAPS the Board has entered into contracts that legally obligate AAPS to offer medical health benefits included in plans defined in those contracts to same sex domestic partners of teachers. As a result of such contractual obligation, the Board has provided certain employees with a cause of action against AAPS if it fails to provide domestic partnership benefits. See Amended Complaint at ¶¶14–15 & Ex. C to the Amended Complaint; *cf.* AAPS Answer to Amended Complaint at ¶¶14-15.
- AAPS spends public funds to provide “domestic partnership” benefits. See Amended Complaint at ¶¶ 15-17; *cf.* AAPS Answer to Amended Complaint at ¶¶15-17.
- By the terms of Defendants’ policies, practices, and contracts, the Defendants do not extend benefits to the hetero-sexual partners of AAPS employees. See Amended Complaint at ¶16; *cf.* AAPS Answer to Amended Complaint at ¶16.

Indeed, AAEEA’s intervention is premised on the existence of the domestic partnership policy and contracts requiring the provision of domestic partnership benefits to some of its members. See AAEEA Answer and Transcript from October 29, 2003 hearing at 4-12.

AAPS filed a Motion For Summary Disposition arguing that the Rohde lacked standing and, in addition, failed to state a claim. See AAPS Motion for Summary Disposition & Docket Sheet at entry for 11/12/03. A hearing was held on the motion, before the Washtenaw County Circuit Court, the Hon. David S. Swartz, presiding; and Judge Swartz granted AAPS’ motion on the grounds that Rohde lacked standing, while declining to address whether Rohde stated a claim. See Order dated December 29, 2003, entered December 30, 2003 & Docket Sheet at entry for 12/17/03 & 12/30/03.

Rohde filed a Motion For Reconsideration. See Plaintiffs Motion For Reconsideration & Docket Sheet at entry for 1/09/04. Rohde made two related points in her motion. First, she argued that the Circuit Court's finding that she lacked standing was contrary to the plain language of MCL 129.61, which authorized actions "for the benefit of" the treasurer. Rohde also demonstrated that the Circuit Court's finding that she had no standing because she had failed to satisfy the "demand" requirement of MCL 129.61 was palpable error for two reasons. First, the Circuit Court raised this new grounds for dismissal, one not advanced by AAPS, which rested on an assumption that the Rohde had not satisfied the "demand" requirement of MCL 129.61. Rohde asserted that the court's reliance upon this ground violated elemental Due Process because the court had raised the issue *sua sponte* without giving her notice or an opportunity to be heard on the issue. Relatedly, Rohde pointed out that the court's assumption was plain error because each of the Plaintiffs had satisfied the demand requirement. See Plaintiffs' Motion For Reconsideration at Ex. 1. The Circuit Court denied Plaintiffs' Motion For Reconsideration on January 12, 2004 in an order that speaks for itself. See Order Denying Plaintiffs' Motion for Reconsideration and Docket Sheet at entry for 1/12/04.

Plaintiffs timely appealed to the Michigan Court of Appeals, by appeal filed January 30, 2004. See Court of Appeals Docket No. 253565. As reflected in this Court's docket sheet, Rohde timely filed an Application For Leave To Appeal To The Supreme Court pursuant to MCR 7.302. By order entered April 30, 2004, this court denied the Plaintiffs' Application because it was not persuaded that the questions presented should be reviewed by this Supreme Court before consideration by this Court of Appeals.

While the appeal was pending, the people of the State of Michigan ratified Proposal 2, the

“marriage amendment”, which became Article I, §25 of the Constitution of the State of Michigan; Rohde brought this amendment to the attention of the Court of Appeals as supplemental authority conclusively demonstrating that AAPS’ same-sex “domestic partnership” benefits policy was unlawful; the Appellees’ made motions to strike that supplemental authority; and the Court of Appeals denied those motions by order dated February 3, 2005. AAPS then brought a motion for reconsideration of the order denying its motion to strike, which the Court of Appeals denied on April 4, 2005.

The case was argued before the Michigan Court of Appeals on April 5, 2005. On April 14, 2005, the Court of Appeals affirmed the Circuit Court’s dismissal of Rohde’s claims in an opinion that speaks for itself. Rohde now timely files this Application For Leave To Appeal.

LAW AND ARGUMENT

This Court must grant Rohde's Application and, upon the conclusion of proceedings before this Court, enter an opinion reversing the Court of Appeals' decision and directing the Circuit Court to provide her with the relief she has requested. There is no question that she has standing to advance claims under the plain language of MCL 129.61. And it is also certain that AAPS has no power to define, recognize, and subsidize same-sex "domestic partnerships" when the people of the State of Michigan have prohibited the recognition of same-sex "marriages." The grant of summary disposition is reviewed *de novo*. See e.g. *Durcon Co. v. Detroit Edison Co.*, 250 Mich. App. 553, 556 (2002). Such review and relief are particularly appropriate because the issues raised in Rohde's Application present questions of law that are reviewed *de novo*. See *Soupal v. Shady View, Inc.*, 469 Mich. 458, 462 (2003) ("An appellate court reviews *de novo* matters of statutory construction...."). Rohde's claims for declaratory and injunctive relief are likewise reviewed *de novo*. See *Dressel v. Ameribank*, 468 Mich 557, 561 (2003) (interpretation of statute barring unauthorized practice of law is reviewed *de novo*); *Little v. Kin*, 249 Mich. App. 502, 507 (2002) (equitable relief reviewed *de novo*)././

I. The Plaintiffs/Appellants Have Standing To Challenge AAPS' "Domestic Partnership" Benefits Policy Under The Plain Language Of MCL 129.61.

In this case, Rohde brought her claims pursuant to MCL 12.61. By its terms, MCL §129.61 provides that a taxpayer:

may institute suits...at law or equity on behalf of or for the benefit of the treasurer of such political subdivisions, for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by any public officer, board or commission of such political subdivision. Before such suit is instituted a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto....

MCL §129.61. In its opinion, the Court of Appeals quite rightly rejected—as contrary to common sense—the Circuit Court’s holding that a suit brought to halt the unlawful expenditure of public funds was not a suit brought “on behalf or for the benefit of” the treasurer of the public body to which the funds belong. Opinion at 1-4.

However, the Court of Appeals went on to hold that Rohde had not satisfied the “demand” requirement of the statute for three related reasons. First, Rohde had used the word “request” not “demand” in the letter she had directed to members of AAPS’ school board. Opinion at 4. Second, Rohde had demanded that the Board halt the illegal expenditure rather than making a demand that the treasurer bring suit against the board (to halt the illegal expenditure). *Id.* Third, Rohde had directed her request to school board members, not the treasurer. *Id.*

The Court of Appeals interpretation of MCL 129.61 is error as a matter of law. It is fundamental that, “when construing a statute, this Court must consider the object of the statute and apply a reasonable construction that best accomplishes the purpose of the statute.” *See Shenkman v. Bragman*, 261 Mich. App. 412, 682 N.W. 2d 516, 517 (2004). As demonstrated

below, the appellate court's interpretation of MCL 129.61 violates this cardinal principle in several related ways.

For one thing, the Court of Appeals' holding that Rohde's "request" did not satisfy the "demand" requirement of MCL 129.61 defies the plain language of the statute, its own reasoning, and common sense. In its opinion, the Court of Appeals observed that terms used in a statute must be given their plain meaning and noted that the dictionary definition of "demand" is "to ask for with proper authority." Opinion at 4. Of course, this is precisely what Rohde did: she requested (i.e. asked), AAPS to halt its unlawful expenditure based upon the proper authority conferred upon her by MCL 129.61.

Moreover, requiring taxpayers to use the less civil term "demand" is not only a pointless exercise in semantics, it actually contradicts the well settled principle that "when construing a statute, this Court must consider the object of the statute and apply a reasonable construction that best accomplishes the purpose of the statute." *See Shenkman*, 261 Mich. App. at 414, 682 N.W. 2d at 517. Commonsense indicates that a (civil) request is more likely to secure the desired result—the halting of an unlawful expenditure—than a more provocative demand. Put another way, common sense indicates that the appellate court's construction of the statutory term is not a reasonable construction, i.e., one designed to actually advance the object of the statute: to halt unlawful expenditures, not engender litigation.

The appellate court's opinion that MCL 129.61 requires Rohde to demand that the public officials file suit (against themselves) likewise defies the duty to "consider the object of the statute and apply a reasonable construction that best accomplishes the purpose of the statute." *See Shenkman, supra*. Despite the appellate court's apparent confusion, the purpose of the

demand requirement is to halt the unlawful expenditure—not “demand a legal action” as the Court of Appeals would have it. Opinion at 4. Thus the demand is a *demand to take the steps needed to halt the illegal expenditure*, not a demand to embark upon litigation that is needless (if the demand is respected). Indeed, it is both wholly unnecessary and absurd to construe MCL 129.61 so as to require a public officer or body to bring suit (against itself) to stop an unlawful expenditure that may be stopped voluntarily.

For related reasons, the Court of Appeals’ holding that Rohde’s letters to AAPS’ board were insufficient to satisfy MCL 129.61 defies the plain language of the statute and common sense . Opinion at 4.¹ For one thing, the statute expressly authorizes a demand upon the “board.” See MCL 129.61. The reason is obvious: the board is the decision-making body with the power to halt the unlawful expenditure and, as such, the proper object of the statutory demand. More fundamentally, it makes no sense to construe MCL 129.61 so as to require the taxpayer to demand that the treasurer sue the board and, based on that construction, require a demand on the treasurer (as opposed to the board). Indeed, the Court of Appeals recognized as much when it rejected AAPS’ argument that Rohde did not have standing because the treasurer was a defendant. See Opinion at 3 (“it would violate common sense to interpret MCL 129.61 in such a way that would permit a treasurer’s refusal to take action to prevent taxpayers from suing....Such an interpretation would enable corrupt treasurers to block the recovery of such funds and to permit the misappropriation to continue.”). For these reasons, the Court of Appeals erred as a matter of law when it held that a request that the AAPS board halt the illegal expenditure did not satisfy the statutory requirement that the taxpayer make a demand upon the board.

¹The record also demonstrates that Rohde asked the Governor, Attorney General, Superintendent of Public Instruction, and County Attorney to halt the illegal expenditure.
Appellants’ Application For Leave To Appeal

II. AAPS' Policy Defining, Recognizing, and Subsidizing Same-Sex "Domestic Partnerships" Is Unlawful And Results In An Unlawful Expenditure Of Public Funds.

This Court should also find that AAPS' policy is contrary to law and enter an order directing the Circuit Court to provide the relief she has requested upon remand. Although the Court of Appeals declined to address the merits of Rohde's claim, it is fundamental that this Supreme Court has plenary authority to resolve legal issues of the kind presented by Rohde's Application; and this Court exercises that plenary authority where, as here, the issue is one of law and the facts necessary for its resolution have been presented. *See e.g. People v. Reed*, 449 Mich. 375 (1995)(deciding ineffective assistance of counsel argument without remand to lower courts); *Koski v. Vohs*, 426 Mich. 424 (1986)(Court ruling on question of probable cause because question was one of law). Further, such review is particularly appropriate in this case because the pleadings demonstrate that there is no dispute about the existence or features of the Defendants' "domestic partnership" policy and Rohde's request for declaratory and equitable relief will be reviewed *de novo* in any event. *See Dressel v. Ameribank*, 468 Mich 557, 561 (2003)(interpretation of statute barring unauthorized practice of law as it bears on filling out mortgage document is reviewed *de novo*); *Little v. Kin*, 249 Mich. App. 502, 507 (2002)(equitable relief reviewed *de novo*). As demonstrated below, AAPS' definition, recognition, and subsidization of same-sex domestic partnerships violates Michigan's constitution as well as the state law governing marriage. This Court should grant Rohde's application for leave to appeal and resolve the questions of law she presents for review.

A. AAPS' Policy Defining, Recognizing, And Subsidizing Same-Sex "Domestic Partnerships" Is Unlawful Because It Is Contrary To Article I, §25 of the Michigan Constitution.

AAPS same-sex domestic partnership benefits policy violates Article I, §25 of the Michigan Constitution. That amendment provides:

To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

MI Const. 1963, Article I, §25. By its plain language, the amendment prohibits the state, including political subdivisions such as AAPS, from recognizing same-sex unions (regardless of the label attached), for any purpose—including the provision of benefits.

As demonstrated by the pleadings, AAPS policy provides that in order for the same-sex domestic "partner" to qualify for benefits etc., they must complete their "Declaration of Domestic Partnership". In that declaration, the same-sex "domestic partners" certify the following:

- They are of the same sex, have an intimate and committed relationship and co-habitate; *Cf.* MCL §551.1 (marriage an inherently unique relationship between man and woman).
- They are competent to contract; *Cf.* MCL §§551.2 (marriage a civil contract between a man and a woman) & MCL § 551.103 (minimum age for marriage).
- they are not married; *Cf.* MCL §551.5 (bigamy prohibited).
- they are not more closely related by blood than what is allowed for legal marriage; *Cf.* MCL §§551.3 (persons a man cannot marry), MCL § 551.4 (persons a woman cannot marry).
- they do not have different domestic partners; *Cf.* MCL §551.5 (bigamy prohibited).

Similarly, once the domestic partnership is terminated, AAPS' policy requires a "Declaration of Termination of Domestic Partnership" akin to the procedure for divorce and governing the

allocation of health-care benefits upon termination. *Cf.* MCL §552.1 *et seq* (procedures for divorce).

There is no question that Ann Arbor Public Schools (“AAPS”), by means of its “domestic partnership” benefits policy, violates Article I, §25. For there is no question that by means of that policy AAPS recognizes the agreement of same-sex partners to unite in a intimate union labeled a “domestic partnership.” There is no question that the “domestic partnership” is a union of same-sex partners that is similar to marriage. And there is no question that AAPS recognizes the union of the same-sex partners in a “domestic partnership” for the purpose of providing medical and other benefits to same-sex partners of employees. For these reasons, AAPS’ policy is contrary to the plain meaning of Article I, §25, which provides that “the union of one man and one women in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.” See also Attorney General Opinion No. 7171 (Const. 1963, art. 1, §26 prohibits state and local governmental units from conferring benefits on their employees based on recognition of a same-sex “domestic partnership.”); *see also Williams v. City of Rochester Hills*, 234 Mich. App. 539, 557 (2001) (Attorney General opinions are not binding but can be persuasive authority).

B. AAPS' Policy Defining, Recognizing, And Subsidizing Same-Sex "Domestic Partnerships Is Unlawful.

Although Article I, §25 undoubtedly requires the invalidation of AAPS' same-sex "domestic partnership" benefits policy, there is also no question that AAPS' "domestic partnership" benefits policy violates a large and well settled body of law governing the exercise of powers granted to subordinate governmental units by the State of Michigan. Pursuant to that law a political subdivision of a state is precluded from enacting an ordinance or regulation "if...the ordinance is in direct conflict with the state statutory scheme or...if the state statutory scheme preempts the ordinance by regulating the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation." *People v. Llewellyn*, 401 Mich. 314, 321 (1977)(holding Detroit obscenity ordinance preempted by state law).

Schools are defined as political subdivisions in MCL §129.61 and subject to these legal principles precisely because they are political subdivisions created by the state. *See* MCL §129.61; *see also East Jackson Public Schools v. State*, 133 Mich. App. 132, 139 (1984) ("[s]chool districts and other municipal corporations are creations of the state. Except as provided by the state , they have no existence, no functions, no rights, no powers."); *Bo. of Ed. City of Detroit v. Michigan Bell Tel. Co.*, 395 Mich 1, 5 (1975)("school district is a type of municipal corporation"); *Cody v. Southfield-Lathrup*, 25 Mich. App. 33 (1970)(school districts are agencies of the state); *see also King v. School Dist. No. 5 of Warren Tp., Macomb Cnty*, 261 Mich 605, 609 ("a school district...is only a quasi municipal corporation, merely a state agency carrying out the distinctively governmental work of education.").

Precisely because schools are subject to state law, school policies that conflict with state

law are void. *See e.g. Feaster v. Portage Public Schools*, 451 Mich. 351 (1996)(district policy which required custody by legal guardianship imposing requirement not included in School Code was void); *Snyder v. Charlotte Public School Dist.*, 421 Mich. 517 (1985)(district policy requiring full-time attendance to attend classes offered by public schools imposing requirement not mandated by School Code was void); *see also Rowley v. Garvin*, 221 Mich. App. 699 (1997)(local school policy defining “full time” student could not be used to define “full-time” student for purpose of state law governing postmajority support where state law defined term).

Likewise, schools have no power to enter into agreements that are contrary to state law. *See e.g. Mino v. Clio School Dist*, 255 Mich. App. 60 (2003)(confidentiality clause of severance agreement between school and superintendent is contrary to state law and therefore void). And, of course, PERA does not authorize—and cannot be used to legitimize—agreements contrary to state law. *See Metropolitan Council No. 23 v. City of Center Line*, 414 Mich. 642 (1982)(voiding arbitration panel decision which imposed layoff provision on city as not supported by PERA and noting, “[a] third category of bargaining subjects is illegal subjects. Illegal subjects will not be enforced even if the parties agree to bargain over such issues.”). Indeed, it would be nonsensical to suppose that PERA could be used to authorize contracts in violation of state law because such an interpretation of the statute would produce an absurd result.

As explained further below, AAPS’ policy defining, recognizing, and subsidizing domestic partnerships is void because it violates both of the principles limiting the use of general powers given to subdivisions of the State. First, AAPS’ policy enters the field of domestic relations by defining and recognizing a new domestic relationship, akin to marriage, the

“domestic partnership.” In so doing, it has entered a field that is occupied by state law such that AAPS’ policy is void. Second, AAPS’ policy of defining and subsidizing domestic partnerships undermines the state law that is designed to prohibit the recognition of same-sex unions by the State of Michigan including, of course, AAPS—a creature of the State.

This Supreme Court’s decision in *Mack v. City of Detroit*, 467 Mich. 186 (2002) demonstrates the operation of these principles and shows that the AAPS’ actions are unlawful. In *Mack* the City of Detroit had used its general powers as a Home-Rule City to prohibit discrimination based on sexual orientation. Mack brought suit against the City, alleging that she was discriminated against because she was a woman and a lesbian, and seeking damages based on the alleged violation of the charter provisions. The City responded by claiming the charter could not create liability against the municipality.

The Supreme Court held that the City could not use its unquestioned home-rule power to create a cause of action against the City for discrimination based on sexual-orientation because such an exercise of the City’s powers was inconsistent with state law, more specifically, the Governmental Tort Liability Act, M.C.L. §691.1407. *Id* at 193-94. In doing so this Court rejected the claim that the City’s action was authorized by the general grant of power to the City, emphasizing that the City’s powers were “subject to the constitution and law.” For this reason any effort to create liability on the part of the City for sexual-orientation discrimination was void because it was inconsistent with state law. And on remand the Court of Appeals held that the City also could not use its general powers to create a cause of action for sex discrimination because this area had been preempted by the Elliot Larsen Civil Rights Act. *See Mack v. City of Detroit*, 254 Mich. App. 498 (2003). As *Mack* illustrates, the principles outlined above leave no

doubt that AAPS' policy of defining, recognizing, and subsidizing domestic partnerships is unlawful.

1. AAPS Has No Power To Define, Recognize, And Subsidize Same-Sex Domestic Partnerships In Connection With Its Administration Of The Public Schools Because The Field of Domestic Relations Is Occupied By The State.

AAPS has no power to define and recognize same-sex “domestic partnerships” because the State of Michigan has occupied the field of domestic relations, including that area of law which pertains to whether same-sex unions shall be recognized by this State (including AAPS). There is no question that the State’s regulation of the “domestic relationships” that can be recognized by the State of Michigan is comprehensive. State law provides that marriage is a relationship between a man and a woman, announces the public policy of supporting that relationship; and it further provides that a “marriage contracted between individuals of the same sex is invalid in this state.” MCL §551.1 State law declares that marriage is a civil contract “between a man and a woman”, and consent alone is not enough to contract a marriage, thus ensuring that persons qualify for marriage under state law and barring common law marriage. MCL §551.2. State law limits the persons a man and woman can marry—providing that they cannot marry same-sex partners. MCL §§551.3 & 551.4. And state law prohibits more than one partner. MCL §551.5.

State law, of course, also governs capacity to marry. State law provides that the parties must be of a certain age to be legally competent. MCL §551.103. State law specifies those who have power to solemnize marriage, i.e. publicly recognize the commitment of the parties. MCL §551.7; *see also Black’s Law Dictionary*, p. 1392 (defining solemnize as “to enter marriage publicly before witnesses in contrast to a clandestine or common law marriage.”). State law also

penalizes those who solemnize marriages wrongly. MCL §§ 551.14, 551.15, 551.16, 551.17.

And state law requires a license and certificate for the purpose of public records. MCL §551.18, MCL §§551.101, 551.102

State law also governs the recognition of domestic relations created in other states, including same-sex marriages. State law bars the recognition of same-sex marriages between state residents contracted in other states. MCL §551.271. Likewise, state law bars recognition of marriages that are not between a man and a woman regardless of whether the marriage is valid under the laws of another state. MCL §551.272.

Just as state law governing the formation and recognition of the domestic relation that is marriage, it governs the procedure for termination of that relationship. State law provides that marriages contracted by persons incompetent to do so in law are void. MCL §552.1. Because such relationships have significant consequences for society, state law provides an elaborate procedure for divorce, including the requirements for securing a judgment or decree of divorce. MCL §552.1 *et seq.* In connection with the termination of this relationship, state law provides a detailed scheme for support, including the provision of health care benefits to the former spouse. *See e.g.* MCL §552.601 *et seq.*

There is no question that AAPS' policy of defining and recognizing a new domestic relation, the "domestic partnership" enters the field occupied by the state law. As demonstrated by the pleadings, AAPS policy provides that in order for the same-sex domestic "partner" to

qualify for benefits etc., they must complete their “Declaration of Domestic Partnership.” In that declaration, the same-sex “domestic partners” certify the following:

- They are of the same sex, have an intimate and committed relationship and co-habitate; *Cf.* MCL §551.1 (marriage an inherently unique relationship between man and woman).
- They are competent to contract; *Cf.* MCL §§551.2 (marriage a civil contract between a man and a woman) & MCL § 551.103 (minimum age for marriage).
- they are not married; *Cf.* MCL §551.5 (bigamy prohibited).
- they are not more closely related by blood than what is allowed for legal marriage; *Cf.* MCL §§551.3 (persons a man cannot marry), MCL § 551.4 (persons a woman cannot marry).
- they do not have different domestic partners; *Cf.* MCL §551.5 (bigamy prohibited).

Similarly, once the domestic partnership is terminated, AAPS’ policy requires a “Declaration of Termination of Domestic Partnership” akin to the procedure for divorce and governing the allocation of health-care benefits upon termination. *Cf.* MCL §552.1 *et seq* (procedures for divorce).

AAPS’ recognition of a domestic relation that cannot exist under state law, i.e. “domestic partnership”, is an integral part of its policy subsidizing “domestic partnerships”. It is the definition and recognition of the “domestic partnership” which makes it possible to differentiate the same-sex “partners” from opposite-sex “partners” who are unmarried under state law so AAPS can treat same-sex partners as akin to married spouses. And just as AAPS’ policy provides for the declaration and recognition (i.e. solemnization) of the domestic partnership, it provides a method for the termination of such partnerships that is akin to a decree of divorce. Plainly, AAPS’ policy enters into the area of domestic relationships that are defined and

regulated by state law. As a result, AAPS' policies in this area are unlawful. AAPS has general powers but here, as in *Mack*, those powers do not include the right to define and recognize domestic relationships. *Cf. Mack v. City of Detroit*, 467 Mich. 186 (2002)(City's general powers did not give it power to subject itself to liability for discrimination based on sexual orientation); *Bo. of Ed. City of Detroit v. Michigan Bell Tel. Co.*, 395 Mich 1, 5 (1975) (school board's power to do all things necessary to promote education did not include power to condemn property); *East Jackson Public Schools*, 133 Mich. App. at 139 (general powers granted to schools did not included power to bring legal challenge to state law governing school finance).

2. AAPS' Policy Defining, Recognizing, And Subsidizing "Domestic Partnerships" Is Unlawful Because It Conflicts With State Law Prohibiting The Recognition of Same-Sex Marriages.

AAPS' decision to recognize and subsidize domestic partnerships is also unlawful because it undermines state law in the area of domestic relations and marriage. Although the people of the State of Michigan have decided that same-sex unions will not be recognized in this State, AAPS' policy does just that.

As noted above, the Legislature has wholly occupied the field of domestic relations, including marriage, divorce, and the recognition of same-sex marriages. Recognizing that the Legislature has occupied this field, Michigan's courts have repeatedly refused to take any action that would undermine state law in this area. Thus, for example, the courts have refused to employ the doctrine of unclean hands to prevent a party from voiding a bigamous marriage because to do so would undermine the law prohibiting bigamy. *See Harris v. Harris*, 201 Mich. App. 65 (1993). Likewise, courts have refused to allow unmarried "partners" to take property by reason of the meretricious relationship because doing so would undermine the state law

governing marriage. *See Ford v. Wagner*, 153 Mich. App. 466 (1986)(unmarried man who lived with woman without legal marriage could not recover as “other person” under dramshop act because no legal rights accrue based upon a relationship which does not meet the statutory criteria of a marriage and barring common law action for loss of consortium because to do so would recognize common law marriages); *Carnes v. Sheldon*, 109 Mich. App. 204 (1981) (Court refusing to allow an unmarried partner to recover support on an implied contract theory because to do so would undermine the state law governing marriage).

The respect for the Legislature’s action in this area reflected in these judicial decisions is mandatory for subdivisions of the state, including AAPS. As noted above, it is fundamental that a municipal body cannot enact a regulation that is in direct conflict with a statutory scheme. *Llewellyn*, 401 Mich. at 322. And the Michigan Supreme Court has emphasized that “[a] direct conflict exists...when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits.” *Id* at n. 4. Any number of municipal regulations are preempted under these principles. *See e.g. Howell Township v. Rooto Corp.*, 20003 WL 22136268 (Ct. App. 236440)((2003)(NREPA preempted ordinance allowing township to recover costs of fighting “toxic fire”); *Michigan Coalition For Responsible Gun Owners v. City of Ferndale*, 256 Mich. App. 401 (2003)(state laws regulating gun ownership preempted local ordinance creating gun-free zones); *Michigan Restaurant Assoc. v. City of Marquette*, 245 Mich. App. 63 (2001)(state law addressing nonsmoking seats in restaurants preempted ordinance banning smoking); *Sherman Bowling Center v. City of Roosevelt Park*, 154 Mich App. 576 (1986)(state law preempted city ordinance concerning requirements for liquor license).

These controlling legal principles demonstrate that AAPS has no power to define and

recognize a new domestic relationship akin to marriage, i.e. the “domestic partnership” for the purpose of administering the AAPS system or subsidize this relationship as if the domestic “partners” were spouses. It is obvious that the whole purpose of the state law outlined above is to prevent the State of Michigan (including its subdivisions) from recognizing same-sex unions whether the civil contract (i.e. agreement) between the parties is labeled a “marriage” (and solemnized) or a “partnership” (and recognized). For this reason, the law not only prohibits the solemnizing of such same-sex unions in Michigan, but also prohibits the recognition of such unions solemnized under the marriage laws of other states, whether contracted by state residents or non-Michigan residents. See MCL §§551.1, 551.271 & 551.272. Pursuant to these laws, neither the same-sex nor the opposite-sex partners of AAPS employees can take benefits available to spouses under state law based on their intimate relationships, cohabitation etc. Under the well established principles noted earlier, same-sex partners cannot be allowed to benefit by virtue that relationship under state law.

AAPS’ policy is plainly designed to circumvent this limitation in order to provide “domestic partnership” benefits for same-sex partners. That goal is achieved *via* a policy that recognizes the meretricious relationship and uses AAPS’ general powers to confer benefits on same-sex “partners.” In fact, the conflict could not be more direct; Michigan law prohibits the recognition of common law marriages precisely cause such recognition conflicts with state law, see MCL 551.2, but AAPS does just that, in substance, for the same-sex couples privileged by its “domestic partnership” benefits policy. By any realistic measure, AAPS’ policy plainly undermines state law governing same-sex marriages—which cannot be recognized under state law; and AAPS cannot justify its actions with reference to its general powers precisely because

here, as in *Mack, supra*, AAPS’ general powers must be exercised “as provided by law.” MCL 380.11a. Put another way, AAPS’ policy is unlawfully precisely because it obligates itself to recognize and provide benefits to same-sex partners purchased with public funds; and, in so doing, it has provided a cause of action against itself for breach of an obligation to support a domestic relationship that cannot be recognized under Michigan law. *Cf. Mack v. City of Detroit*, 467 Mich. 186 (2002)(City cannot use general powers to create liability for discrimination based on sexual orientation). For these reasons, AAPS’ policy of recognizing and subsidizing same-sex “domestic partnerships” is unlawful.

CONCLUSION

This Supreme Court should grant Rohde's Application and resolve the important legal questions she presents for review. Truth be told, there is no question that she has standing to advance her claims under the plain language of MCL 129.61 and the statutory authority to bring suits designed to prevent the unlawful expenditure of public funds should not be subject to the absurd limiting construction placed upon the statute by the Court of Appeals. And it is also certain that AAPS has no power to define, recognize, and subsidize same-sex "domestic partnerships" with public funds when the people of the State of Michigan have prohibited the recognition of same-sex "marriages." For these reasons, as explained herein, this Supreme Court should grant Rohde's application, reverse the Court of Appeals, and enter an order requiring the Circuit Court to provide the relief Rohde has requested upon the conclusion of proceedings before this Court. In so doing, this Court will remove any doubt that marriage must remain, as the people of the State of Michigan have said, a unique and privileged institution based upon the unique relationship between one man and one woman.

Respectfully submitted,

April 26, 2005.



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EXHIBIT 1

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

TERRI RHODE, BRENDON QUILTER,
MARY QUILTER, WALTER MACKEY,
BARBARA MACKEY, GARY GIBSON
ELLEN GIBSON, TED JUNGKUNTZ, LOISE
JUNGKUNTZ, DAVID SPONSELLER,
MARY SPONSELLER, MIKE GLADIEUX,
MARTHA GLADIEUX, HELEN RYSSE,
TERRY TROMBLEY, JOHN WILLIAMS and
THERESE WILLIAMS,

Plaintiffs,

v

ANN ARBOR PUBLIC SCHOOLS, a/k/a The
Public Schools of the City of Ann Arbor,
BOARD OF EDUCATION FOR ANN
ARBOR PUBLIC SCHOOLS, KAREN
CROSS, in her official capacity as President of
the Board of Education for Ann Arbor Public
Schools, and GLENN NELSON, in his official
capacity as Treasurer of the Board of
Education for Ann Arbor Public Schools,

Defendants.

AND

ANN ARBOR EDUCATION ASSOCIATION,
MEA/NEA,

Intervening Defendants.

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**OPINION AND ORDER GRANTING
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION**

At a Session of Court held in the
Washtenaw County Trial Court
City of Ann Arbor, on December 29, 2003.

PRESENT: HONORABLE DAVID S. SWARTZ, Circuit Court Judge

Defendants bring a motion for summary disposition pursuant to MCR 2.116(C)(5) on the ground that Plaintiffs lack standing to sue and have failed to meet the requirements of the operative statute, MCLA 129.61. Defendants argue that MCLA 129.61 limits actions to those brought on behalf of or for the benefit of the treasurer and does not provide taxpayers with a private right of action. In the alternative Defendants move for dismissal of Plaintiffs' action for failure to state a claim upon which relief can be granted. MCR 2.116(C)(8).

Plaintiffs assert that Defendants' policy of defining and recognizing domestic partnerships is inconsistent with state law, and that subsidizing benefits for such same-sex partnerships constitutes an "unlawful expenditure of public funds." Plaintiffs argue they have standing to sue pursuant to MCLA 129.61 because the "very real interest of the Plaintiffs in barring the Defendants' unlawful practices" establishes Plaintiffs, not the treasurer, as the real parties in interest.

The operative statute, MCLA 129.61, provides as follows:

Any person or persons, firm or corporation, resident in any township or school district, paying taxes to such political unit, may institute suits or actions at law or in equity on behalf of or for the benefit of the treasurer of such political subdivision, for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by any public officer, board or commission of such political subdivision. Before such suit is instituted a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto. Security for costs shall be filed by the plaintiff or plaintiffs in any such suit or action and all costs and expenses of the same shall be paid by the person or persons

instituting the same unless and until a recovery of such funds or moneys be obtained as the result of such proceedings.

According to the plain language of the statute, any lawsuit brought by a taxpayer for the recovery of funds “unlawfully expended” must be brought “on behalf of or for the benefit of the treasurer of such political subdivision.” Although MCLA 129.61 allows taxpayer suits, the statute has been interpreted to restrict such actions to the “mentioned circumstances.” *In Culver ex rel Longyear, Treasurer of School District v. Brown*, 259 Mich 294, 296 (1932). As the Court in *Burton Township of Genesee County v. Speck*, 378 Mich 213, 222-223 (1966) opined, such restrictions must be strictly enforced:

The requirements of this statute are onerous. Any finding that the permission granted to a taxpayer to sue provided a substitute party for the supervisor, the township’s designated agent, must meet all possible objections.

* * *

In the case of the ordinary taxpayer, his interest is even more minute. Such minimal interest is one reason why the supervisor’s duty to represent the township should not be shifted.

Defendants object to Plaintiffs’ suit on the ground that “Plaintiffs do not sue on behalf of the treasurer, but instead on their own behalf.” Plaintiffs’ argument that “the Plaintiffs, not the treasurer, are the real parties in interest” is tantamount to an admission that Plaintiffs’ suit is based on an interest separate and distinct from that of the treasurer. Based on the reasoning of *Speck*, the Court finds that Plaintiffs have not filed suit “on behalf of or for the benefit of the treasurer.” Instead, Plaintiffs have filed suit based on a presumed private right of action which is clearly not permitted by the statute.


Further, Plaintiffs have failed to demonstrate to the satisfaction of the Court that they complied with the mandatory requirement of making a “demand” prior to filing suit. A “request” to Defendants to “halt this illegal use of tax revenues in 2001” does not meet the specific

statutory requirement that “demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto.”

The Court finds that Plaintiffs have failed to meet the “onerous” requirements of MCLA 129.61. Based on the Court’s determination that Plaintiffs lack standing to sue, it is unnecessary for the Court to review the substantive merit of the case. Accordingly, Defendants’ motion for summary disposition pursuant to MCR 2.116(C)(5) is GRANTED.

This is a final order which disposes of all pending claims and resolves the case. MCR 2.602(A)(3).

IT IS SO ORDERED.



David S. Swartz,
Circuit Court Judge

EXHIBIT 2

STATE OF MICHIGAN
COURT OF APPEALS

TERI ROHDE, BRENDON QUILTER, MARY
QUILTER, WALTER MACKEY, BARBARA
MACKEY, GARY GIBSON, ELLEN GIBSON,
TED JUNGKUNTZ, LOISE JUNGKUNTZ,
DAVID SPONSELLER, MARY SPONSELLER,
MIKE GLADIEUX, MARTHA GLADIEUX,
HELEN RYSSE, TERRY TROMBLEY, JOHN
WILLIAMS, and THERESE WILLIAMS,

Plaintiffs-Appellants,

V

ANN ARBOR PUBLIC SCHOOLS a/k/a PUBLIC
SCHOOLS OF THE CITY OF ANN ARBOR,
BOARD OF EDUCATION FOR ANN ARBOR
PUBLIC SCHOOLS, PRESIDENT OF THE
BOARD OF EDUCATION FOR ANN ARBOR
PUBLIC SCHOOLS, and TREASURER OF THE
BOARD OF EDUCATION FOR ANN ARBOR
PUBLIC SCHOOLS,

Defendants-Appellees,

and

ANN ARBOR EDUCATION ASSOCIATION,
MEA/NEA,

Intervening Defendant-Appellee.

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right the opinion and order granting defendants summary disposition. We affirm.

FOR PUBLICATION
April 14, 2005
9:05 a.m.

No. 253565
Washtenaw Circuit Court
LC No. 03-001046-CZ

Official Reported Version

Plaintiffs are individual taxpayers who live in the Ann Arbor school district. Defendants provide medical benefits to certain same-sex partners of Ann Arbor Public Schools (AAPS) employees, but these benefits do not extend to unmarried heterosexual partners of AAPS employees. Plaintiffs sought declaratory and injunctive relief prohibiting the provision of these benefits, which are paid for with public funds derived from state and local tax revenues. Defendants moved for summary disposition pursuant to MCR 2.116(C)(5), arguing that plaintiffs lacked standing to bring this lawsuit. The trial court agreed, finding that plaintiffs did not bring the lawsuit on behalf of or for the benefit of the AAPS treasurer and that they failed to comply with the demand requirement of MCL 129.61.

Plaintiffs challenge the trial court's grant of summary disposition to defendants. We review de novo a trial court's ruling on a motion for summary disposition pursuant to MCR 2.116(C)(5). *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003). In reviewing a grant of a motion for summary disposition pursuant to MCR 2.116(C)(5), we must consider the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties. *Id.* Statutory interpretation involves a question of law that we also review de novo. *Id.* Finally, whether a party has standing is a question of law that we review de novo. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001).

Legal actions must be prosecuted in the name of the real party in interest. MCL 600.2041; MCR 2.201(B). A real party in interest is one who is vested with a right of action in a given claim, although the beneficial interest may be with another. *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp*, 221 Mich App 301, 311; 561 NW2d 488 (1997). "Traditionally, a private citizen has no standing to vindicate a public wrong or enforce a public right where he is not hurt in any manner differently than the citizenry at large." *Waterford School Dist v State Bd of Ed*, 98 Mich App 658, 662; 296 NW2d 328 (1980). This traditional common-law bar on taxpayer lawsuits has been relaxed under certain circumstances by statute. *Id.* at 662-663. In the instant case, plaintiffs claim standing pursuant to MCL 129.61, which provides:

Any person or persons, firm or corporation, resident in any township or school district, paying taxes to such political unit, may institute suits or actions at law or in equity on behalf of or for the benefit of the treasurer of such political subdivision, for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by any public officer, board or commission of such political subdivision. Before such suit is instituted a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto. Security for costs shall be filed by the plaintiff or plaintiffs in any such suit or action and all costs and expenses of the same shall be paid by the person or persons instituting the same unless and until a recovery of such funds or moneys be obtained as the result of such proceedings.

In its opinion and order, the trial court relied on two cases in support of its determination that plaintiffs did not file their lawsuit "on behalf of or for the benefit of" the AAPS treasurer: *Culver ex rel Longyear v Brown*, 259 Mich 294; 243 NW 10 (1932), and *Burton Twp v Speck*, 378 Mich 213; 144 NW2d 347 (1966). Neither decision supports the court's ruling. The *Culver*

opinion does not address the meaning and application of the statutory phrase "on behalf of or for the benefit of the treasurer" Rather, the decision addresses whether the funds expended constituted "funds or moneys misappropriated or unlawfully expended" *Culver, supra* at 296-297. Additionally, the decision stands for the proposition, among others, that MCL 129.61 limits the right of a taxpayer to recover to the "mentioned instances," i.e., those specifically identified in the statutory language. *Culver, supra* at 296.

Furthermore, the trial court relied on the following language from *Burton Twp*: "The requirements of this statute are onerous. Any finding that the permission granted to a taxpayer to sue provided a substitute party for the supervisor, the township's designated agent, must meet all possible objections." *Burton Twp, supra* at 222 (Adams, J., dissenting). The trial court attributed this quote to "the Court," but it actually came from the dissenting opinion written by Justice Adams. Thus, the language relied on by the trial court is neither precedential nor binding. See *Salinas v Genesys Health Sys*, 263 Mich App 315, 318 n 3; 688 NW2d 112 (2004). Moreover, *Burton Twp* does not address the issue of taxpayer standing. The *Burton Twp* plaintiff did not sue as a taxpayer, but as the township supervisor, and *Burton Twp* addresses the tolling of the period of limitations.

Whether the instant action was filed "on behalf of or for the benefit of" the AAPS treasurer presents a question of statutory interpretation. There are no reported cases addressing the meaning or application of the language "on behalf of or for the benefit of," and the statute does not define this phrase. Accordingly, under the rules of statutory construction, every word and phrase must be ascribed its plain and ordinary meaning. Dictionary definitions may be consulted to this end. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). *Random House Webster's College Dictionary* (1997) defines the phrase "on behalf of" as meaning "as a representative of or a proxy for" and "benefit" as "something that is advantageous or good."

We conclude that plaintiffs filed their lawsuit "on behalf of or for the benefit of" the AAPS treasurer, even though he was named as a defendant in the lawsuit. MCL 129.61 permits taxpayers to sue townships and school districts for an accounting and recovery of misappropriated public moneys, provided the taxpayers bring the lawsuit "on behalf of or for the benefit of the treasurer" of the township or school district. Plaintiffs are taxpayers and argue that the AAPS, in offering benefits to the same-sex partners of AAPS employees, misappropriates public moneys. A lawsuit for the recovery of funds misappropriated by a township or school district is always "for the benefit of the treasurer" of that township or school district. Accordingly, if the payment of benefits to same-sex partners is deemed unlawful, then public money was misspent and may be recaptured. The recapture of funds would increase the funds in the AAPS account, over which the treasurer exercises control, and provide guidance to the treasurer regarding the propriety of future expenditures.

Defendants argue that the fact that the treasurer is a named defendant in this action proves that plaintiffs' lawsuit is not "on behalf of or for the benefit of" the treasurer. The fact that the treasurer did not personally believe that the AAPS benefits provision is a misappropriation of public moneys, and thus chose not to join plaintiffs' suit, does not mean that the lawsuit in which he is named as a defendant is not "for the benefit of" the treasurer. If, in fact, the offering of benefits to same-sex partners is a misappropriation of public moneys, a

favorable resolution for plaintiffs is for the benefit of the office of the AAPS treasurer, regardless of whether the treasurer personally believes a misappropriation has occurred.

Moreover, it would violate common sense to interpret MCL 129.61 in such a way that a treasurer's refusal to take action could prevent taxpayers from suing the school district for misappropriation of funds. Such an interpretation would enable corrupt treasurers to block the recovery of those funds and permit the misappropriation to continue. This certainly violates the spirit of MCL 129.61, which is to enable taxpayers to prevent misappropriation of public funds by government officials when the government officials themselves refuse to act. We therefore conclude that the trial court erroneously determined that plaintiffs did not bring this lawsuit on behalf of or for the benefit of the AAPS treasurer within the meaning of MCL 129.61.

Our inquiry does not end there, however. The trial court correctly determined that plaintiffs failed to satisfy the demand requirement of MCL 129.61. The statute provides, in part, "Before such suit is instituted a *demand* shall be made on the public officer, board or commission whose duty it may be to *maintain such suit* followed by a neglect or refusal to take action in relation thereto." (Emphasis added.) Plaintiffs claim that they satisfied this requirement by sending letters to various individuals, including members of the school board, requesting that the individuals stop the alleged misappropriation of funds. The wording of the letters is as follows:

I [or We] write to request that you investigate and halt the use of public funds to provide so-called "domestic partnership" benefits to employees of the Ann Arbor public schools. I [or We] believe that the School District's extension of these benefits to its employees exceeds its authority and violates the state law governing marriage. I [or We] ask that you halt this illegal use of public funds at your earliest convenience.

Pursuant to MCL 129.61, the party must contact the appropriate party ("the public officer, board, or commission whose duty it may be to maintain such suit") and make a demand that a lawsuit be brought by that party for an accounting or recovery of misappropriated funds. Consulting a dictionary to ascribe the term "demand" its plain and ordinary meaning, *Koontz, supra* at 312, we find that it provides the definition "to ask for with proper authority; claim as a right." *Random House Webster's College Dictionary* (1997). Moreover, the phrase "maintain such suit" indicates that the purpose of the demand requirement is to inform the appropriate party that legal action is forthcoming. Plaintiffs' letters are merely a request that the alleged misappropriation stop; they are not a demand for legal action. Moreover, plaintiffs did not send a letter to the AAPS treasurer, the officer likely responsible for maintaining such a lawsuit.

Plaintiffs claim that they were denied notice and an opportunity to be heard, and argue that the trial court's determination—that they failed to satisfy the demand requirement—violated their right to due process because the court raised the issue sua sponte. The burden was on plaintiffs to meet the standing requirements of MCL 129.61, and they were aware of the demand requirement. From the face of the statute, they could have ascertained that their letters did not meet that requirement. That the court, on its own accord, raised the issue of plaintiffs' failure to meet the demand requirement did not violate their right to due process. We therefore conclude that the trial court properly granted defendants summary disposition because plaintiffs failed to meet the demand requirements of MCL 129.61.

Given our resolution of the standing issue, we need not consider plaintiffs' remaining issue.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Hilda R. Gage

STATE OF MICHIGAN
in the
MICHIGAN SUPREME COURT

Teri Rohde, Brendon Quilter, Mary Quilter,)
Walter Mackey, Barbara Mackey,)
Gary Gibson, Ellen Gibson, Ted Jungkuntz,)
Loise Jungkuntz, David Sponseller, Mary)
Sponseller, Mike Gladieux, Martha Gladieux,)
Helen Rysse, and Terry Trombley, John and)
Therese Williams,)

Supreme Court No.

Court of Appeals No. 253565
Circuit Court No. 03-1046-CZ

Plaintiffs, Appellants)

v.)

Ann Arbor Public Schools a/k/a The Public)
Schools of the City of Ann Arbor, Board of)
Education, Ann Arbor Public Schools, Karen)
Cross, in her official capacity as President of)
the Board of Education for Ann Arbor Public)
Schools; and Glenn Nelson, in his official)
capacity as Treasurer of the Board of Education)
for Ann Arbor Public Schools.)

Defendants, Appellees)

and)

Ann Arbor Education Association, MEA/NEA)

Intervening Defendant, Appellee)

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NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL

Plaintiffs/Appellants' hereby give this Court notice that on May 26, 2005 they submitted to the Michigan Supreme Court their Application For Leave To Appeal from the Opinion and Order of the Court of Appeals rendered April 14, 2005 affirming the dismissal of their claim by the Circuit Court for Washtenaw County by Opinion and Order rendered December 30, 2003 by the Honorable David S. Swartz.

THOMAS MORE LAW CENTER
Attorneys for Plaintiffs

By: 

Patrick T. Gillen (P47456)
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P.O. Box 393
Ann Arbor, MI 48106
(734) 827-2001

Dated: May 26, 2005

STATE OF MICHIGAN
in the
MICHIGAN SUPREME COURT

Teri Rohde, Brendon Quilter, Mary Quilter,)
Walter Mackey, Barbara Mackey,)
Gary Gibson, Ellen Gibson, Ted Jungkuntz,)
Loise Jungkuntz, David Sponseller, Mary)
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NOTICE OF HEARING

PLEASE TAKE NOTICE that pursuant to MCR 7.302(A)(2) **Plaintiffs/Appellants'**
Application For Leave To Appeal will be submitted for consideration before the Court on a
Tuesday that is at least 21 days after the filing of the application, i.e. June 14, 2005.

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Dated: May 26, 2005

STATE OF MICHIGAN
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MICHIGAN SUPREME COURT

Teri Rohde, Brendon Quilter, Mary Quilter,)	
Walter Mackey, Barbara Mackey,)	
Gary Gibson, Ellen Gibson, Ted Jungkuntz,)	Supreme Court No.
Loise Jungkuntz, David Sponseller, Mary)	
Sponseller, Mike Gladieux, Martha Gladieux,)	
Helen Rysse, and Terry Trombley, John and)	
Therese Williams,)	
)	Court of Appeals No. 253565
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Cross, in her official capacity as President of)	
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for Ann Arbor Public Schools.)	
)	
Defendants, Appellees)	
)	
and)	
)	
Ann Arbor Education Association, MEA/NEA)	
)	
Intervening Defendant, Appellee)	
)	
)	

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PROOF OF SERVICE

Angela C. Doran, being sworn, states that on May 26, 2005, she caused to be mailed copies of Plaintiffs/Appellants' Application For Leave To Appeal, Notice Of Filing Application For Leave To Appeal, and Notice Of Hearing to:

Seth M. Lloyd
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by placing said copies in the United States mail, properly addressed, with first-class postage fully

prepaid.


Angela C. Doran, being sworn, states that on May 26, 2005, she caused to be sent overnight mail copies of Plaintiffs/Appellants' Notice Of Filing Application For Leave To Appeal to:

Clerk of the Court
Washtenaw County Circuit Court
101 East Huron
Ann Arbor, MI 48107


Clerk of the Court
Michigan Court of Appeals
Cadillac Place
3020 W. Grand Blvd., Suite 14-300
Detroit, MI 48202

by placing said copies in the Federal Express receptacle, properly addressed, with postage paid by sender.

Dated: May 26, 2005


Angela C. Doran

Subscribed and sworn to before me on May 26, 2005:



Francia S. Morello, Notary Public
Oakland County, Michigan (acting in Washtenaw County, Michigan)
My commission expires: 07/05/2011



May 26, 2005

VIA HAND DELIVERY

Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa
Lansing, MI 48915

Re: Teri Rohde et al v. Ann Arbor Public Schools et al
Court of Appeals No. 253565
Lower Court No. 03-1046-CZ

Dear Sir/Madam:

Enclosed please find the original and seven (7) copies of the Plaintiffs/Appellants' Application For Leave To Appeal and the originals and one copy each of the Notice of Filing Application For Leave To Appeal, Notice of Hearing, and Proof of Service. Please file in your usual manner.

Also enclosed please find a check in the amount of \$375.00 to cover the filing fee.

I am also enclosing an extra copy of each document for you to time-stamp and return to our office in the self-addressed stamped envelope enclosed.

If you have any questions, please do not hesitate to contact me. Thank you for your attention to this matter.

Sincerely,

Patrick T. Gillen

PTG/acd

Enclosures

cc: James Cameron, Jr. (w/enc.)
Arthur Przybylowicz (w/enc.)



STATE OF MICHIGAN
in the
SUPREME COURT

TERI ROHDE, BRENDON QUILTER, MARY
QUILTER, WALTER MACKEY, BARBARA
MACKEY, GARY GIBSON, ELLEN GIBSON,
TED JUNGKUNTZ, LOISE JUNGKUNTZ,
DAVID SPONSELLER, MARY SPONSELLER,
MIKE GLADIEUX, MARTHA GLADIEUX,
HELEN RYSSE, TERRY TROMBLEY, JOHN
WILLIAMS, and THERESE WILLIAMS,

Plaintiffs-Appellants,

v

ANN ARBOR PUBLIC SCHOOLS a/k/a The
Public Schools of the City of Ann Arbor, BOARD
OF EDUCATION, ANN ARBOR PUBLIC
SCHOOLS, KAREN CROSS, in her official
capacity as President of the Board of Education
for Ann Arbor Public Schools; and GLENN
NELSON, in his official capacity as Treasurer of
the Board of Education for Ann Arbor Public
Schools,

Defendants-Appellees,

-and-

ANN ARBOR EDUCATION ASSOCIATION,
MEA/NEA,

Intervening Defendant-Appellee.

Supreme Court No.128768

Court of Appeals No. 253565

Circuit Court No. 03-1046-CZ

**INTERVENING DEFENDANT-
APPELLEE'S BRIEF
OPPOSING APPLICATION FOR
LEAVE TO APPEAL**

128768

FILED
JUN 20 2005
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

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TABLE OF CONTENTS

Index of Authorities and Exhibits.....	ii
Counter-Statement of Jurisdiction and Grounds for Review	1
Counter-Statement of Issue on Appeal	
I. Do Plaintiffs-Appellants lack standing to sue pursuant to MCL 129.61?	6
Counter-Statement of Issue Raised by Plaintiffs-Appellants which is Not on Appeal	
II. Is AAPS’s policy of providing domestic partner health benefits to same-sex partners of school district employees pursuant to its collective bargaining agreement with the AAEA consistent with Michigan law?	6
Counter-Statement of Factual and Procedural Background	7
Argument	10
Relief Requested	28

INDEX OF AUTHORITIES AND EXHIBITS

Constitutional Provisions

1963 Const. Art. 1, §2.....	25
1963 Const. Art. 1, §10.....	26
1963 Const. Art. 1, §25.....	3
1963 Const. Art. 12, §2.....	24

Case Law

<i>Allied Bldg. Credits v Mathewson</i> , 335 Mich 270; 55 NW2d 826 (1952)	4
<i>Allstate Ins Co v Hayes</i> , 442 Mich 56; 499 NW2d 743 (1993)	11
<i>Board of Education of the School District for the City of Detroit v Parks</i> , 417 Mich 268, 280; 335 NW2d 641 (1983)	18
<i>Bond v Public Schools of Ann Arbor School Dist.</i> , 383 Mich 693; 178 NW2d 484 (1970)	21
<i>Booth Newspapers, Inc. v University of Michigan Bd of Regents</i> , 444 Mich 211; 507 NW2d 422 (1993)	4
<i>Brown v JoJo-Ab, Inc.</i> , 191 Mich App 208; 477 NW2d 121 (1991)	14
<i>City of Detroit v Detroit Policy Officers Ass’n.</i> , 408 Mich 410; 294 NW2d 68 (1980)	11

<i>City of Highland Park v Royal Oak No. 7 Storm Sewer Drain Dist.,</i> 309 Mich 646; 16 NW2d 106 (1944)	4
<i>City of Lansing v Schlegel,</i> 257 Mich App 627; 669 NW2d 315 (2003)	18
<i>Connors v Boston,</i> 430 Mass 31; 714 NE2d 335 (Mass, 1999)	22
<i>Crawford v City of Chicago,</i> 304 Ill App 3d; 818 710 NE2d 91 (ILL APP, 1999)	22
<i>Detroit Police Officers Association v Detroit,</i> 391 Mich 44; 506 NW2d 803 (1974)	18
<i>Gordon Grossman Bldg., Co. v Elliott,</i> 382 Mich 596; 171 NW2d 441 (1969)	4
<i>Heinsma v City of Vancouver,</i> 144 Wash2d 556; 29P3d 709 (WA 2001)	22
<i>Horner's Trucking Service, Inc. v Michigan State Highway Dept.,</i> 64 Mich App 513, 236 NW2d 122 (1975)	14
<i>House Speaker v Governor,</i> 443 Mich 560; 506 NW2d 190 (1993)	11
<i>Hussey v Muskegon Heights,</i> 36 Mich App 264; 193 NW2d 421 (1971)	14
<i>In re Proposal C,</i> 384 Mich 390; 195 NW2d 9 (1971)	20
<i>Kent Co. Deputy Sheriffs' Assoc v Kent Co. Sheriff,</i> 238 Mich App 310; 605 NW2d 363 (2000)	18

<i>Knight v Swartzenegger</i> , 2004 WL 2011407 (Cal Superior, 2004).....	22
<i>Koski v Vohs</i> , 426 Mich 424; 395 NW2d 226 (1986)	4
<i>Kunzig v Liquor Control Commission</i> , 327 Mich 474; 42 NW2d 247 (1950)	25
<i>Lee v Macomb Co</i> , 464 Mich 726; 629 NW2d 900 (2001)	11
<i>Lowe v Broward County</i> , 766 So2d 1199; (Fla App 4 Dist. 2000)	22
<i>Lujan v Defenders of Wildlife</i> , 504 US 555; 112 S Ct 2130; 119 L Ed 351 (1992).....	11
<i>Maclean v Scripps</i> , 52 Mich 214; 17 NW 815 (1883)	4
<i>Michigan Farm Bureau v Hare</i> , 379 Mich 387; 151 NW2d 797 (1967)	21
<i>Michigan State AFL-CIO v Employment Realitions Com'n</i> , 453 Mich 362; 551 NW2d 165 (1996)	26
<i>People v Blachura</i> , 390 Mich 326; 212 NW2d 184 (1973)	25
<i>People v Harding</i> , 53 Mich 481; 19 NW 155 (1884)	23
<i>People v Jahner</i> , 443 Mich 490; 506 NW2d 151 (1989)	18

<i>People v Nash,</i> 418 Mich 196; 341 NW2d 439 (1983)	20
<i>People v Reed,</i> 449 Mich 375; 535 NW2d 496 (1995)	4
<i>Poelman v Payne,</i> 332 Mich 597; 52 NW2d 229 (1952)	4
<i>Power Press Sales Co v MSI Battle Creek Stamping,</i> 238 Mich App 173; 604 NW2d 772 (1999)	22
<i>Pritchard v Madison Metro School Dist.,</i> 242 Wis2d 301; 625 NW2d 613 (WIS APP 2001)	22
<i>Regents of University of Michigan v Employment Relations Commission,</i> 389 Mich 96; 204 NW2d 218 (1973)	18
<i>Rockwell v Board of Ed. Of School Dist. of Crestwood,</i> 393 Mich 616; 227 NW2d 736 (1975)	18
<i>Romer v Evans,</i> 517 US 620; 116 SCt 1620 (1996)	26
<i>Ruzitz v Serbian Nat. Home Soc.,</i> 315 Mich 292; 24 NW2d 125 (1946)	4
<i>Schaefer v City of Denver,</i> 973 P2d 717; (Colo. App. 1998)	22
<i>Schwartz v City of Flint,</i> 426 Mich 295; 395 NW2d 678 (1986)	18
<i>Slattery v City of New York,</i> 179 Misc2d 740; 686 NYS2d 683 (NY Sup 1999)	22

<i>Stephenson v Golden,</i> 279 Mich 710; 276 NW 849 (1937)	4
<i>Turnley v Rocky's Teakwood Lounge, Inc,</i> 215 Mich App 371; 547 NW2d 33 (1996)	14
<i>Tyma v Montgomery Cnty. Counsel,</i> 369 Md 497; 801 A2d 148 (MD 2002)	22
<i>United States v Brown,</i> 381 US 437; 85 SCt 1707, 14 Led2d 484 (1965)	27
<i>Wayne County Civil Service Commission v. Board of Supervisors,</i> 384 Mich 363; 184 NW2d 201 (1971)	18
<i>White v City of Ann Arbor,</i> 406 Mich 554; 281 NW2d 283 (1979)	20

Statutes

MCL 129.61	2
MCL 423.201	8
MCL 423.215(3)(a)	19
MCL 551.1	16
MCL 551.271	16
MCL 551.272	16
MCL 555.1	1

Court Rules

MCR 7.302(B).....	1
MCR 7.302(B)(1)	1
MCR 7.302(B)(2)	1
MCR 7.302(B)(3)	1

Index of Exhibits

Supreme Court Order (April 30, 2004)	Exhibit 1
Citizens for the Protection of Marriage Brochure	Exhibit 2

COUNTER-STATEMENT OF JURISDICTION AND GROUNDS FOR REVIEW

This court lacks jurisdiction over the instant case because Plaintiffs-Appellants have failed to establish that any of the required grounds for appeal exist pursuant to the applicable court rule. Plaintiffs-Appellants erroneously assert that this Court has jurisdiction pursuant to MCR 7.302(B)(1)-(3). MCR 7.302(B) establishes the grounds for jurisdiction and requires Plaintiffs-Appellants to show, in relevant part, that:

- (1) The issue involves a substantial question as to the validity of a legislative act;
- (2) The issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity; [or]
- (3) The issue involves legal principles of major significance to the state's jurisprudence[.]

Plaintiffs-Appellants claim that the instant case meets these first three requirements of MCR 7.302(B) by improperly relying upon the underlying merits of the case rather than the actual issues on appeal. Plaintiffs-Appellants, in essence, assert that their appeal is two-part. First, they dispute the appellate court's affirmation of the lower court's determination that they lack standing, and from that opinion they seek leave to appeal. Second, they seek resolution of their claims regarding the Defense of Marriage Act (DOMA), MCL 555.1, by this Court without remand for a trial on the merits. In fact, they even attempt to add a new claim never presented to the trial court. Only the standing issue is before the Court in this appeal and should serve as the sole basis for determining jurisdiction under MCR 7.302(B)(1)-(3).

The issue of whether Plaintiffs-Appellants have standing to sue over their state law claims does not involve "a substantial question as to the validity of a legislative act"

as required by MCR 7.302(B)(1). No party questions the validity of MCL 129.61, governing taxpayer lawsuits for the misappropriation of public funds, which sets forth the standing requirements at issue. Plaintiffs-Appellants instead state their claims involve “substantial questions of Michigan law.” However, the rule requires more than just a substantial question of Michigan law; it requires “a substantial question **as to the validity of a legislative act.**” (Emphasis added.) Since the issue on appeal is one concerning standing requirements under MCL 129.61, and since no party challenges the validity of that law, Plaintiffs-Appellants’ first stated basis for appeal is not satisfied.

Next, it cannot be said that the issue of Plaintiffs-Appellants’ standing has the “significant public interest” required by MCR 7.302(B)(2). Plaintiffs-Appellants state that “the very purpose of MCL 169.71, (sic) is to authorize suits to prevent unlawful expenditures of public funds.” While that may be true, the appellate court’s determination that Plaintiffs-Appellants failed to meet the “demand” requirement of that law is of little significance to anyone but Plaintiffs-Appellants themselves. The effect of the appellate court’s ruling was to clarify the “demand” requirement. It did not add anything new to the statute’s standing requirements. In fact, the clarification of the “demand” requirement by the Court of Appeals can be easily followed by taxpayers in the future, so there will not be any significant impact on future taxpayer lawsuits. As such, there is no “significant public interest” in Plaintiffs-Appellants’ failure to achieve standing for their claims. In likely recognition of this fact, Plaintiffs-Appellants again assert that the underlying merits of the case would meet the “significant public interest” requirement. While that may or may not be true, it is irrelevant since this issue is not on appeal, and the second stated ground for appeal cannot be satisfied on that basis. Therefore, Plaintiffs-Appellants have failed to establish this Court’s jurisdiction pursuant

to MCR 7.302(B)(2).

Finally, Plaintiffs-Appellants again rely upon the merits of the case in an attempt to establish the grounds set forth in MCR 7.302(B)(3). They state that, "...if AAPS has authority to define, recognize, and subsidize same-sex 'domestic partnerships', then there is nothing to stop any mayor, city, or village from recognizing same-sex marriages under the guise of 'domestic partnerships.'" However, this is not the issue on appeal. The issue on appeal is whether Plaintiffs-Appellants have standing to pursue their claims, which is hardly a matter which "involves legal principles of major significance to the state's jurisprudence." The claims themselves are not subject to review at this time. As such, Plaintiffs-Appellants again fail to meet the grounds for appeal established by court rule.

Since Plaintiffs-Appellants have failed to establish any grounds whatsoever for their appeal, this Court is without jurisdiction to decide their claims and, as such, should deny their application for leave to appeal the decision of the Court of Appeals.

In addition to reviewing the appellate court's ruling as to their lack of standing, Plaintiffs-Appellants assert this Court should pass on the merits of their case despite the fact that no court below has yet done so, no discovery has taken place, and no hearing on the merits has yet been held. Plaintiffs-Appellants also boldly add a new cause of action to their claim without even seeking leave to amend their pleadings. They freely raise the amendment to Article 1, § 25 of the Michigan Constitution as dispositive of their underlying claims, yet this amendment came into effect while the standing issue was pending in the Court of Appeals. This Court should not entertain review of this new claim so late in these proceedings.

It has long been the rule that this Court will not review issues that were not raised

in and decided by the trial court.¹ Issues raised for the first time in appeal are not ordinarily subject to review.² However, Plaintiffs-Appellants erroneously contend that this Court has jurisdiction to render a decision on the merits of the original case, including the newly-raised constitutional issue. In support of this contention, Plaintiffs-Appellants cite just two cases which purport to give this Court authority to take up issues not previously raised in or decided by a lower court. A careful review, however, reveals no correlation between those cases and the instant appeal.³ To the extent this Court has ever exercised what Plaintiffs-Appellants refer to as this Court's "plenary authority", the merits were reached only to prevent a miscarriage of justice whereby the appealing party would have been left without a forum or remedy if appellate review was denied. That situation does not exist in this case. No miscarriage of justice will occur if the merits of the instant case are not immediately decided, as the opportunity for remand to the circuit court remains. Further, a determination of the merits is wholly unnecessary to resolving the basis of this appeal - the issue of standing. In addition, Plaintiffs-Appellants may simply cure the defects cited by the courts below and re-file

1 "The failure to raise a question in the lower court precludes, as a general rule, the Supreme Court considering it on appeal." *Gordon Grossman Bldg. Co. v Elliott*, 382 Mich 596, 602; 171 NW2d 441 (1969). "An issue not pleaded nor otherwise presented to the trial court cannot be urged on appeal." *Allied Bldg. Credits v Mathewson*, 335 Mich 270, 275; 55 NW2d 826 (1952). "...[T]his Court does not and should not consider for the first time on appeal an issue not submitted to or passed upon by the trial court..." *Poelman v Payne*, 332 Mich 597, 605; 52 NW2d 229 (1952). "This court may not review what was not viewed by the trial court." *Stephenson v Golden*, 279 Mich 710, 733; 276 NW 849 (1937). "It would be going entirely beyond our authority to notice what has not been ruled on and excepted to below." *Maclean v Scripps*, 52 Mich 214, 223; 17 NW 815 (1883).

2 *Booth Newspapers, Inc. v University of Michigan Bd of Regents*, 444 Mich 211; 507 NW2d 422 (1993); *Ruzitz v Serbian Nat. Home Soc.*, 315 Mich 292; 24 NW2d 125 (1946). "Inasmuch as this is a new question and the lower court had no opportunity to pass upon it, we decline to even consider it." *City of Highland Park v Royal Oak No. 7 Storm Sewer Drain Dist.*, 309 Mich 646, 654; 16 NW2d 106 (1944).

3 Cases relied upon by Plaintiffs-Appellants include *People v Reed*, 449 Mich 375, 535 NW2d 496 (1995) (case dealing with ineffective assistance of counsel argument pursuant to court rules relating to post-appeal relief in criminal matters); *Koski v Vohs*, 426 Mich 424, 395 NW2d 226 (1986) (trial court and appellate court rulings on existence of probable cause were properly appealed for review by the Supreme Court).

their complaint. They will be in no worse position as a result of either of these options. They will not be left without a forum or remedy. There is no crisis related to the resolution of their standing issue which will cause any form of substantial harm to Plaintiffs-Appellants or their interests if the merits of their case are not decided right now by this Court. In fact, were this Court to entertain a decision on the merits of the case as requested by Plaintiffs-Appellants, it would be at the expense of the Defendants-Appellees, since the merits of the case have not been tried in the lower court and, as such, all avenues of legal relief have not yet been exhausted.

The order appealed from should remain the sole focus of this tribunal. The issue is whether the courts below erred in granting summary disposition to the Defendants-Appellants on the issue of standing. The merits of the case are irrelevant to this review and are certainly in no way necessary to resolve the issue of standing.

For these reasons, this Court does not have jurisdiction to review the underlying merits of this case, including the newly raised issue concerning the constitutional amendment, and should decline the invitation to do so because the case law does not support it and the requirements of justice do not call for it.

COUNTER-STATEMENT OF ISSUE ON APPEAL

I. Do Plaintiffs-Appellants lack standing to sue pursuant to MCL 129.61?

Intervening Defendant-Appellee's Answer: YES

Defendants-Appellees' Answer: YES

Circuit Court's Ruling: YES

Court of Appeals Ruling: YES

Plaintiffs-Appellants' Answer: NO

COUNTER-STATEMENT OF ISSUE
RAISED BY PLAINTIFFS-APPELLANTS
WHICH IS NOT ON APPEAL

II. Is AAPS's policy of providing domestic partner health benefits to same-sex partners of school district employees pursuant to its collective bargaining agreement with the AAEEA consistent with Michigan law?

Intervening Defendant-Appellee's Answer: YES

Defendants-Appellees' Answer: YES

Circuit Court's Ruling: Did not rule

Court of Appeals Ruling: Did not rule

Plaintiffs-Appellants' Answer: NO

COUNTER-STATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND

The following information concerning the background of this case is provided since it was not fully presented in the version set forth by Plaintiffs-Appellants:

Plaintiffs-Appellants are taxpayers residing in the Ann Arbor Public School District. Defendants-Appellees are the Ann Arbor Public Schools (“the AAPS”), the Board of Education of the AAPS (“the Board”), and two officers of the Board. The AAPS and Board are referred to collectively as “the District”. The Intervening Defendant-Appellee is the Ann Arbor Education Association, MEA/NEA (“the AAEEA”). The AAEEA is the sole and exclusive bargaining representative of the teachers employed by the District.

The factual and procedural background of this case is relatively simple, since the case was dismissed soon after it was filed. Plaintiffs-Appellants filed suit against Defendants-Appellees on September 22, 2003, alleging misappropriation of public funds. (*Circuit Court Docket* entry 9/22/03.) In essence, Plaintiffs-Appellants complained that the District paid insurance premiums for same-sex domestic partner benefits in contravention of Michigan law, which defines marriage as between only a man and a woman, and prohibits same sex marriage. Plaintiffs-Appellants originally contended that recognizing and defining same-sex domestic partnerships somehow violates Michigan law by conferring a marriage-like status upon individuals in these relationships. Further, they complained that by providing health benefits to same-sex domestic partners of school district employees, Defendants-Appellees were misappropriating public funds because they were thereby making illegal expenditures. (*First Amended Complaint.*)

Since domestic partner benefits are collectively bargained, contractual benefits,

pursuant to the Public Employment Relations Act (PERA), MCL 423.201 *et seq*, AAEA, a labor organization, moved to intervene as a full party defendant in the case to protect the interests of its members, both present and future, as well as the integrity of the existing collective bargaining agreement. (*Circuit Court Docket* entry 10/27/03.) The motion was heard on October 29, 2003, and granted. (*Circuit Court Docket* entry 10/29/03.) Subsequently, Plaintiffs-Appellants filed their First Amended Complaint, purportedly to disclaim any interest in impacting existing contractual provisions, only future provisions. (*First Amended Complaint*, p. 3, para. 6.)

On November 7, 2003, Defendants-Appellees filed a motion for summary disposition, citing lack of standing and failure to state a claim upon which relief could be granted as the bases for dismissal. (*Defendants' Motion for Summary Disposition*.) The AAEA concurred. (*Circuit Court Docket* entry 11/21/03.) A hearing on the motion was held on December 17, 2003, and the circuit court judge issued his opinion and order granting the motion on December 30, 2003. (*Opinion and Order Granting Defendants' Motion for Summary Disposition*.)

Pursuant to the circuit court's order, there were two bases for dismissing the case. First, the court found that Plaintiffs-Appellants failed to bring their suit "on behalf of or for the benefit of the treasurer" as required by MCL 129.61. Second, the court determined that they failed to make a "demand" prior to filing suit, as required by the same law. Since the circuit court ruled that Plaintiffs-Appellants lacked standing to sue for these two reasons, the underlying merits of the case were never reached.

On January 9, 2004, Plaintiffs-Appellants filed a motion for reconsideration with the circuit court, which was subsequently denied on January 12, 2004. (*Plaintiffs' Motion for Reconsideration*. Also, *Opinion and Order Denying Plaintiffs' Motion for*

Reconsideration.) Plaintiffs-Appellants then filed a claim of appeal with the Michigan Court of Appeals on January 30, 2004, protesting the two bases the circuit court relied upon in determining they had no standing. While this matter was pending in the Court of Appeals, Plaintiffs-Appellants filed an Application for Leave to Appeal before this Court on or about March 12, 2004. Plaintiffs-Appellants sought this Court's review of the merits of the case, despite the fact that the merits had never before been decided. In an order dated April 30, 2004, this Court denied Plaintiffs-Appellants' Application for Leave stating that it was "not persuaded that the questions presented should be reviewed by this Court before consideration by the Court of Appeals." (Attached as Exhibit 1, *Supreme Court Order.*)

The focus of the case then shifted back to the Court of Appeals. Oral argument was heard on April 5, 2005, and the appellate court issued its opinion on April 14, 2005, affirming the lower court's determination that Plaintiffs-Appellants lack standing to sue. (Attached to Plaintiffs-Appellants' current Application for Leave to Appeal as Exhibit 2, *Court of Appeals Opinion.*) The appellate court declined to rule on the merits of the case stating, "Given our resolution of the standing issue, we need not consider plaintiffs' remaining issue." (*Court of Appeals Opinion*, p. 5.)

The matter now finds itself before this Court on the issue of standing. However, Plaintiffs-Appellants again ask this Court to decide the merits of their underlying claim without the benefit of even a hearing before, let alone an analysis and decision of, the circuit court. This Court should decline the invitation.

ARGUMENT

I. PLAINTIFFS-APPELLANTS LACK STANDING TO SUE PURSUANT TO MCL 129.61.

Plaintiffs-Appellants' lawsuit is rooted in a theory of unlawful expenditure of public funds. MCL 129.61 sets forth the requirements for taxpayer lawsuits brought against a township or school district for an accounting and/or return of misappropriated funds. That statute provides as follows:

Any person or persons, firm or corporation, resident in any township or school district, paying taxes to such political unit, may institute suits or actions at law or in equity on behalf of or for the benefit of the treasurer of such political subdivision, for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by an public officer, board or commission of such political subdivision. **Before such suit is instituted, a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto.** Security for costs shall be filed by the plaintiff or plaintiffs in any such suit or action and all costs and expenses of the same shall be paid by the person or persons instituting the same unless and until a recovery of such funds or moneys be obtained as the result of such proceedings. (Emphasis added.)

The second of the three requirements of this statute is at issue in this appeal, though the AAEA believes that none of the three requirements were met. The primary question is whether Plaintiffs-Appellants failed to make a proper "demand" in advance of filing suit, as required by the statute. Both courts below determined Plaintiffs-Appellants did not. AAEA asserts the circuit court and Court of Appeals did not err in finding Plaintiffs-Appellants failed to conform to the requirements of the statute and thereby failed to establish standing.

A. Plaintiffs-Appellants failed to meet the requirements for standing pursuant to MCL 129.61.

It is incumbent upon the party invoking jurisdiction to meet the burden of

establishing all elements of standing. *Lee v Macomb Co*, 464 Mich 726,740; 629 NW2d 900 (2001), quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 351 (1992) ("The party invoking ... jurisdiction bears the burden of establishing these elements."). "Standing" means that a party must have an interest in the case significant enough to provide effective advocacy. *Allstate Ins Co v Hayes*, 442 Mich 56; 499 NW2d 743 (1993). Having the same interest as a general citizen has been insufficient to evoke standing. *House Speaker v Governor*, 443 Mich 560; 506 NW2d 190 (1993). Michigan courts have described standing to require that a party have "an interest distinct from that of the public." *Lee*, supra.

The dissatisfaction of a taxpayer with the conduct or discretionary decisions of a school district does not alone provide an adequate basis for standing. However, the bar to taxpayer lawsuits is lifted pursuant to statutory authority under certain circumstances. One such statute is MCL 129.61 governing taxpayer suits for misappropriation and illegal expenditure of public funds by townships and school districts. That statute requires three things in order for a taxpayer to meet the "standing" requirement for such a suit: 1) the suit must be filed on behalf of or for the benefit of the treasurer of the township or school district; 2) a demand must be made in advance of the suit which is not pursued by the officer, board or commission involved; and 3) security for costs must be filed by the plaintiff. It is the burden of the taxpayer who elects to proceed in these kinds of cases to meet the standing requirements of the statute.

In this case, Plaintiffs-Appellants failed to meet all three requirements of MCL 129.61, though the circuit court relied only upon their failure to meet the first two requirements in dismissing the case. The Michigan Court of Appeals upheld the circuit court's dismissal, but determined that only the "demand" requirement had not been

satisfied. Since Plaintiffs-Appellants have not met all the standing requirements set forth in the statute, they lack standing to pursue their lawsuit and the lower courts' determinations in this case must be affirmed.

B. Plaintiffs-Appellants failed to make a “demand” prior to filing suit as required by MCL 129.61.

Both the circuit court and appellate court noted that the “demand” requirement of MCL 129.61 calls for more than a mere “request” that the Board cease making the expenditures in question. As part of their request for reconsideration of the circuit court’s order dismissing their case, Plaintiffs-Appellants attached, for the first time, voluminous copies of letters they sent to various individuals, including some (but not all) members of the Board. The wording of the letters is substantially the same despite being sent by different combinations of Plaintiffs-Appellants to a variety of individuals, many of whom had no direct relationship to the Board. A sample of these letters appears in the Court of Appeals’ opinion at page 4 as follows:

I [or We] write to **request** that you investigate and halt the use of public funds to provide so-called “domestic partnership” benefits to employees of the Ann Arbor public schools. I [or We] believe that the School District’s extension of these benefits to its employees exceeds its authority and violates the state law governing marriage. I [or We] **ask** that you halt this illegal use of public funds at your earliest possible convenience.
[Emphasis added.]

No where in their “request” do Plaintiffs-Appellants make a “demand” for action.

Further, their pleadings lack any reference whatsoever to a “demand.”

Paragraph 19 on page 6 of their *First Amended Complaint* states, in part, that

“Plaintiffs...**requested** that the AAPS Board of Education, the County

Prosecutor, the Department of Education, and the Attorney General halt this

illegal use of tax revenues in 2001. No action was taken as a result of their **request.**” (Emphasis added.)

In an attempt to defend their deficient choice of words, Plaintiffs-Appellants make the assertion that using the word “demand” is a matter of semantics (despite the fact that it appears in the statute while the word “request” does not) and that “request” is more “civil,” and therefore more likely to illicit the desired response of halting the allegedly illegal expenditures. Of course, they cite no legal authority for either of these assertions. If it is a change in the wording of the MCL 129.61 they seek in order to affect a kinder, gentler approach to misappropriation litigation, the legislature would be a better forum for such a suggestion. This Court would naturally reject an invitation to revise the letter, and therefore the meaning, of the law, as an unwarranted act of judicial activism outside the bounds of its authority. The plain language of the statute calls for a “demand.” Plaintiffs-Appellants failed to adhere to that very simple, very basic requirement.

In addition, Plaintiffs-Appellants’ “request” lacks any reference to the statute. As such, their “request” does not put the recipients on notice that judicial relief may be sought in the event of non-compliance with the request. The primary reason for requiring a demand such as that set forth in MCL 129.61 is to notify the addressee that there is specific authorization for the demand with the potential for corresponding legal consequences. By failing to make reference to the authorizing statute in their “request” letters, Plaintiffs-Appellants did not even adhere to the spirit of the “demand” requirement of MCL 129.61.

Further, MCL 129.61 requires that “[b]efore such a suit is instituted a

demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit..." Plaintiffs-Appellants failed to send their "request" to the Board's treasurer. The treasurer is the person responsible for making expenditures on behalf of the Board, yet Plaintiffs-Appellants failed to notify the treasurer of their concerns. They sent letters to the county prosecutor, Governor, and Attorney General, but they did not send a letter to the Board's treasurer. Again, Plaintiffs-Appellants failed to adhere to a basic, simple, and very clear provision of the governing statute.

Michigan courts have long recognized the two-fold purpose behind statutory notice/demand requirements such as that found in MCL 129.61. First, notice is given to provide a defendant with the opportunity to investigate the claim while the evidence is still fresh. *Horner's Trucking Service, Inc. v Michigan State Highway Dept.*, 64 Mich App 513, 236 N.W.2d 122 (1975). Second, a notice requirement serves to prevent stale claims.⁴ In preventing stale claims, it is fundamental that legal action be taken in a timely manner after providing notice and an opportunity to cure. Here, Plaintiffs-Appellants waited nearly three years after filing their "request" with the Board before initiating legal action. This significant lag in time has the potential to force a very different composition of the Board to defend against claims aimed at actions of their predecessors. It targets a Board which may have had a different reaction to the original demand but was never put on notice of the claim and was, therefore, without reason to investigate it. The statute envisions prompt action on the part of a plaintiff. After all, the statute in question provides a means to police against the waste of taxpayer

⁴ *Turnley v Rocky's Teakwood Lounge, Inc.*, 215 Mich App 371, 547 NW2d 33 (1996); *Brown v JoJo-Ab, Inc.*, 191 Mich App 208, 477 NW2d 121 (1991); *Hussey v Muskegon Heights*, 36 Mich App 264, 193 NW2d 421 (1971).

money. What could be a bigger waste of taxpayer money than to have a public body defending against actions of its predecessor when timely notice through a proper demand may have resolved the claim?

Based on the foregoing, it is abundantly evident that Plaintiffs-Appellants lack standing to sue pursuant to MCL 129.61. They have failed to establish on appeal that they made proper demands on the proper people as required by the letter and spirit of the statute. As such, this Court should find that both courts below were correct in determining the “demand” requirement of MCL 129.61 was not satisfied and Plaintiffs-Appellants, therefore, lack standing.

C. Plaintiffs-Appellants failed to sue “on behalf of or for the benefit of the treasurer” as required by MCL 129.61.

Even if this Court does not agree with the rationale of the two lower courts regarding the “demand” requirement, there is an alternative basis to uphold dismissal of Plaintiffs-Appellants’ *First Amended Complaint*. The AAEA contends that Plaintiffs-Appellants still failed to sue on behalf of the treasurer of AAPS. The treasurer was never named as a plaintiff in the case, but is a named defendant instead. Further, as pointed out by the circuit court in the order granting summary disposition, Plaintiffs-Appellants argue they are the real parties in interest, as opposed to the treasurer. And while the Court of Appeals acknowledged, at page 3 of its opinion, that the rules of statutory construction require that “every word and phrase must be ascribed its plain and ordinary meaning,” the effect of its ruling on this issue is to strip the meaning from the words requiring suit on behalf of the treasurer. In so doing, the court reasoned that any successful suit would automatically be of benefit to the office of the treasurer, thereby obviating the need to name the treasurer at all (except, presumably, in non-

meritorious suits). This is an unworkable interpretation of the statute.

Based on the foregoing, it is abundantly evident that Plaintiffs-Appellants lack standing to sue pursuant to MCL 129.61. As such, this Court should uphold the rulings of the courts below as to lack of standing.

II. AAPS'S POLICY OF PROVIDING DOMESTIC PARTNER HEALTH BENEFITS TO SAME-SEX PARTNERS OF SCHOOL DISTRICT EMPLOYEES PURSUANT TO ITS COLLECTIVE BARGAINING AGREEMENT IS CONSISTENT WITH MICHIGAN LAW.

A. Michigan's defense of marriage act does not prohibit a public employer from entering into a collective bargaining agreement that includes same sex domestic partner benefits.

1. The DOMA merely regulates who may legally marry.

As set forth in the discussion above regarding this Court's jurisdiction, it is the position of AAEA that the merits of this case are not reviewable at this time. However, should the Court determine review is appropriate despite the arguments raised, it will necessarily conclude that the underlying claims lack merit and must be dismissed.

Plaintiffs-Appellants challenge the right of public employers and labor unions to bargain health benefits for same-sex domestic partners of covered employees. They erroneously rely upon the Defense of Marriage Act (DOMA), MCL 551.1, 551.271 and 551.272, in asserting that bargaining and providing domestic partner health benefits are somehow illegal. The DOMA was enacted in 1996 to invalidate same sex marriages in Michigan, and to establish heterosexual marriage as the only legally recognized form of marriage in Michigan. The actual text of these statutes is as follows:

MCL 551.1

Sec. 1. Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in

encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

MCL 551.271

Sec. 1. (1) Except as otherwise provided in this act, a marriage contracted between a man and a woman who are residents of this state and who were, at the time of the marriage, legally competent to contract marriage according to the laws of this state, which marriage is solemnized in another state within the United States by a clergyman, magistrate, or other person legally authorized to solemnize marriages within that state, is a valid and binding marriage under the laws of this state to the same effect and extent as if solemnized within this state and according to its laws.

(2) This section does not apply to a marriage contracted between individuals of the same sex, which marriage is invalid in this state under section 1 of chapter 83 of the revised statutes of 1846, being section 551.1 of the Michigan Compiled Laws.

MCL 551.272

Sec. 2. This state recognizes marriage as inherently a unique relationship between a man and a woman, as prescribed by section 1 of chapter 83 of the revised statutes of 1846, being section 551.1 of the Michigan Compiled Laws, and therefore a marriage that is not between a man and a woman is invalid in this state regardless of whether the marriage is contracted according to the laws of another jurisdiction.

The challenge raised by Plaintiffs-Appellants is bewildering, to say the least, since DOMA has absolutely nothing to do with the right of an employer, either in the public or private sector, to contract to provide certain health benefits to its employees. DOMA merely regulates who may and may not marry. Pursuant to its terms, only one man and one woman may enter into a legal contract of marriage. None of the parties to this appeal dispute this.

However, Plaintiffs-Appellants take DOMA one step further. They seem to argue that since DOMA states marriage can only be between a man and a woman, public policy has been created which pervasively discriminates against same-sex couples in all aspects of their public lives. Specific to this case is their claim that DOMA prohibits

the extension of health benefits to same-sex domestic partners of employees of a public employer. The rationale provided is that the employer is “treating” these employees as if they are married when they are not, and that is somehow illegal. It certainly stretches one’s imagination to draw any logical, rationale connection between DOMA and health benefits offered by one’s employer.

The plain truth is that the Michigan Legislature has not enacted any statute banning health benefits for same-sex domestic partners of employees of public employers. This void in the law is what drives Plaintiffs-Appellants to seek this Court’s assistance. They would have this Court legislate where the legislature has not. This Court has refused this temptation in the past, and should do so here again.⁵

2. The Public Employment Relations Act, not the DOMA, governs collective bargaining in the public sector and does not prohibit bargaining over same-sex domestic partner benefits.

Michigan’s Public Employment Relations Act (PERA), MCL 423.201 *et seq*, has long been established as the dominant law governing collective bargaining in the public sector.⁶ PERA was originally enacted in 1947, but has been amended multiple times since then, the most recent amendments occurring in 1994 and 1996. PERA has consistently been interpreted by this Court as the dominant law regulating public sector bargaining. In *Board of Education of the School District for the City of Detroit v Parks*, 417 Mich 268, 280; 335 NW2d 641 (1983), this Court stated:

⁵ “It is the function of the court to fairly interpret a statute as it then exists; it is not the function of the court to legislate.” *People v Jahner*, 433 Mich 490, 501, 446 NW2d 151 (1989). See also *Schwartz v City of Flint*, 426 Mich 295, 395 NW2d 678 (1986).

⁶ *Wayne County Civil Service Commission v Board of Supervisors*, 384 Mich 363, 184 NW2d 201 (1971); *Regents of University of Michigan v Employment Relations Commission*, 389 Mich 96, 204 NW2d 218 (1973); *Detroit Police Officers Association v Detroit*, 391 Mich 44, 214 NW2d 803 (1974); *Rockwell v Board of Ed. of School Dist. of Crestwood*, 393 Mich 616, 227 NW2d 736 (1975); *Kent Co. Deputy Sheriffs’ Assoc. v Kent Co. Sheriff.*, 238 Mich App 310, 605 NW2d 363 (2000) *aff’d, but criticized*; *City of Lansing v Schlegel*, 257 Mich App 627, 669 NW2d 315 (2003).

This Court has consistently construed the PERA as the dominant law regulating public employee labor relations.” [Citations omitted]. When there is a conflict between PERA and another statute, PERA prevails, diminishing the conflicting statute *pro tanto*.

PERA precedes DOMA. As such, rules of statutory construction require that DOMA be read in harmony with PERA, as the legislature is presumed to be aware of prior enactments when authorizing new laws. *People v Harrison*, 194 Mich 363; 160 NW 623 (1916). Thus, reading DOMA to create a new prohibition in bargaining would be inconsistent with PERA and contrary to rules of statutory construction. In 1994, PERA was amended to prohibit public employers and employee unions from bargaining over certain subjects. One such prohibited subject of bargaining is the naming of the “policyholder of an employee group insurance benefit.” MCL 423.215(3)(a). This prohibition illustrates the legislature’s ability to regulate aspects of collective bargaining over insurance benefits in the public sector when such is its will. There is no prohibition in PERA against bargaining domestic partner health benefits, be they same sex or opposite sex in nature. Interestingly, the legislature amended PERA again in 1996, the same year they enacted DOMA, yet no further prohibitions on bargaining were added to PERA. In fact, the failure to address same sex domestic partner benefits at all either in the 1996 amendments or at any time subsequently indicates unwillingness on behalf of lawmakers to ban such domestic partner benefits from being bargained. Simply put, there is no law in Michigan that bans same sex domestic partner health benefits from being bargained for, or otherwise provided to, employees in the public or private sectors. As such, Plaintiffs-Appellants’ claims must fail.

- B. Article I, § 25 of the Michigan Constitution does not prohibit a public employer from entering into a collective bargaining agreement to provide same sex domestic partner benefits to its employees.**

As set forth in the Counter-Statement of Jurisdiction and Grounds for Review, Plaintiffs-Appellants seek to introduce a new cause of action by arguing that AAPS' collectively bargained domestic partner benefits policy is contrary to the recently-passed amendment to the Michigan Constitution. This amendment came into effect while Plaintiffs-Appellants' suit was pending on appeal to the Court of Appeals. It is the position of the AAEA that this issue was never pleaded below, and, as such, is not reviewable here. However, should this Court opt to reach the issue despite the jurisdictional and faulty pleading issues, we will address this complex issue of first impression.

1. The plain language of the amendment merely regulates who may legally marry.

Since this is a matter of first impression in Michigan because the newly adopted amendment has yet to be interpreted by the courts, the rules of constitutional construction will apply. The primary and fundamental rule of constitutional or statutory construction is the court's duty is to ascertain the purpose and intent as expressed in the provision in question. *White v City of Ann Arbor*, 406 Mich 554; 281 NW2d 283 (1979). However, the technical tenets of statutory construction do not apply to constitutional provisions. *People v Nash*, 418 Mich 196; 341 NW2d 439 (1983). Separate and distinct principles are utilized in the interpretation and application of constitutional provisions, the foremost requiring the provision to be interpreted in accordance with the "common understanding." *In re Proposal C*, 384 Mich 390; 185 NW2d 9 (1971).

The first rule the Court should follow in ascertaining meaning of words in the

Constitution is to give effect to the plain meaning of such words as understood by the people who adopted it. *Bond v Public Schools of Ann Arbor School Dist.*, 383 Mich 693; 178 NW2d 484 (1970). In interpreting a Constitutional provision, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or mysterious meaning in words employed, but rather that they have accepted them in the sense most obvious to the common understanding. *Michigan Farm Bureau v Hare*, 379 Mich 387; 151 NW2d 797 (1967).

Plaintiffs-Appellants would have this Court believe that the plain language of the Marriage Amendment prohibits same-sex domestic partner benefits for public sector employees and their partners. In fact, the plain language fails to address employee health benefits and clearly only pertains to who may marry. Const. 1963, Art 1, § 25 states:

To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

As is readily apparent, the amendment concerns itself with the “benefits of marriage”, not the benefits of employment (i.e. employer-provided health insurance). It preserves marriage as between one man and one woman, but does not even mention health benefits or other employment-related benefits. From the plain language of this amendment, the purpose is to prohibit any legal form of marriage between parties comprised of something other than one man and one woman. Thus, civil unions or similar arrangements between gay or lesbian couples may not be legally recognized in Michigan.

2. Providing same-sex domestic partner benefits is not akin to recognizing marriage.

Plaintiffs-Appellants assert the meaning of the language goes deeper than the plain and obvious meaning. They contend that the Marriage Amendment should be read such that any public employer who provides same-sex domestic partner benefits is somehow defeating the amendment by “recognizing” a “union” other than between one man and one woman “for any purpose” (in this case, for the purpose of providing health benefits). Plaintiffs-Appellants rely upon the recent opinion of this State’s Attorney General in support of their contention. To their detriment, however, they make the same mistake the Attorney General made in his opinion by ignoring the vast body of legal authority from high courts in nine other jurisdictions which overwhelmingly supports the notion that providing domestic partner health benefits does not equate to recognizing a marriage or marriage-like relationship.⁷ In a case of first impression, Michigan courts have recognized that it is appropriate to rely upon decisions from other jurisdictions addressing similar legal issues.⁸ Despite this fact, Plaintiffs-Appellants and the Attorney General fail to make mention of these important, persuasive rulings. As a result, there is no reconciliation of their contention with that of every other jurisdiction which has considered like issues.

3. The intent of the ratifiers of the Marriage Amendment was not to impact family health benefits.

⁷ *Knight v Swartzenegger*, 2004 WL 2011407 (Cal Superior, 2004); *Tyma v Montgomery Cnty. Counsel*, 369 Md 497, 801 A2d 148 (MD, 2002); *Heinsma v City of Vancouver*, 144 Wash2d 556, 29 P3d 709 (WA, 2001); *Pritchard v Madison Metro School Dist.*, 242 Wis2d 301; 625 NW2d 613 (WIS APP, 2001); *Lowe v Broward County*, 766 So2d 1199 (Fla App 4 Dist, 2000); *Crawford v City of Chicago*, 304 Ill App 3d 818; 710 NE2d 91 (ILL APP, 1999); *Slattery v City of New York*, 179 Misc2d 740, 686 NYS2d 683 (NY Sup, 1999); *Connors v Boston*, 430 Mass 31, 714 NE2d 335 (Mass, 1999); *Schaefer v City of Denver*, 973 P2d 717 (Colo App, 1998).

⁸ *City of Detroit v Detroit Police Officers Ass’n*, 408 Mich 410; 294 NW2d 68 (1980); *Power Press Sales Co v MSI Battle Creek Stamping*, 238 MichApp 173; 604 NW2d 772 (1999).

Plaintiffs-Appellants ignore the history of the Marriage Amendment leading to its passage, and therefore fail to arrive at its correct reading. One of the most important methods of ascertaining the meaning of a constitutional provision is to consider the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished. *In re Proposal C*, supra. This is particularly applicable when considering a constitutional amendment. Constitutional provisions must be interpreted with reference to the times and circumstances under which the Constitution was formed, and the general spirit of the times and the sentiments prevailing among the people. *People v Harding*, 53 Mich 481; 19 NW 155 (1884).

The circumstances leading to the passage of the Michigan Marriage Amendment have not been established in this case (or any other) since Plaintiffs-Appellants have suddenly added this new claim in the course of appealing their original claim. There have been no hearings or taking of testimony, not even any discovery or exchange of exhibit lists. The absence of any record at all makes it impossible for this Court to employ the traditional and well-established methods of construing this amendment in light of its history because its history is unknown. However, there are two other cases which have been filed directly testing the Marriage Amendment. The first is an Ingham County Circuit Court Case (Case No. 05:368-CZ) in which the Plaintiffs seek declaratory relief from the Attorney General's opinion discussed above. The second is a recently-filed claim in federal district court in Kalamazoo challenging the amendment's constitutionality on grounds of equal protection. Those cases are better positioned for determination of the issues Plaintiffs-Appellants seek to improperly pursue in this Court. Their case is a standing case at this time. Had they cured their standing defects, they could have re-filed their case to properly include the constitutional claim, but they failed to do so. As such, it is certain the Marriage Amendment issues they are concerned

with will be addressed and resolved. But the instant case is not ripe for such a determination.

Given the opportunity to establish a record regarding the circumstances leading to the passage of the Marriage Amendment, the AAEA would establish the following turn of events:

- Over the backdrop of an ongoing national debate about same-sex marriage, state courts across the nation, beginning with Hawaii in 1993, started grappling with same-sex marriage prohibitions as relate to equal protection claims, generally finding such prohibitions to be unconstitutional.
- In 1996, partially in response to these judicial rulings, the United States Congress passed the Defense of Marriage Act, limiting marriage to the union of one man and one woman. Michigan followed suit, passing its own version of the law the same year.
- A Michigan ballot campaign committee called Citizens for Protection of Marriage (“CFPM”) began a petition drive for a constitutional change in light of perceived weaknesses in Michigan’s DOMA enabling courts to justify same-sex unions.
- In 2004, Michigan became one of 12 states where constitutional amendments on marriage were initiated.
- On or about July 5, 2004, the CFPM filed a petition with the Michigan Secretary of State, Bureau of Elections, seeking to amend Article I, Section 25 of the Michigan Constitution.
- Pursuant to Const. 1963, Art. 12, § 2, the CFPM submitted its “statement

of purpose” for approval by the Board of State Canvassers, which rendered a split decision as to the sufficiency of the statement.

- The CFPM sought, and was granted, relief through the Michigan Court of Appeals via a complaint for mandamus.
- Leading up to the November 2004 election, the CFPM produced and circulated a brochure describing the purpose and limitations of the proposed amendment, proclaiming, “Proposal 2 is *Only* about Marriage.” See Exhibit 2.
- On November 2, 2004, the Marriage Amendment appeared on the electoral ballot and was approved by 58% of those voting.
- The amendment became effective December 17, 2004.

4. Plaintiffs-Appellants’ reading of the Marriage Amendment is not in harmony with other provisions of the Michigan Constitution.

Constitutional provisions should be read in harmony. *People v Blachura*, 390 Mich 326; 212 NW2d 182 (1973) (*overruled on other grounds*). Every statement in a State Constitution must be interpreted in light of the whole document. *Blachura*, supra.

When two provisions of the Constitution appear to conflict in a measure, the courts must reconcile them as far as possible. *Kunzig v Liquor Control Commission*, 327 Mich 474; 42 NW2d 247 (1950). This becomes relevant because Plaintiffs-Appellants ask this Court to endorse a reading of the Marriage Amendment which runs contrary to other provisions of the Constitution guaranteeing equal protection and barring bills of attainder.

Article I, § 2 of the Michigan Constitution provides, in part, that, “No

person shall be denied the equal protection of the laws, nor shall any person be denied the enjoyment of his civil or political rights..." However, construing the Marriage Amendment to deny domestic partner health benefits to same-sex partners of public employees creates an equal protection dilemma by singling out an identifiable group of citizens for different treatment. Further, if the amendment is used to prohibit Michigan governmental units, both state and local, from even acknowledging the existence of same-sex relationships for purposes of providing employment protections, the amendment violates the equal protection clause per the ruling in *Romer v Evans*, 517 US 620; 116 SCt 1620 (1996). In that case, an amendment to the Colorado State Constitution forbade the extension of minority or protected status to homosexuals in the public workplace. The United States Supreme Court ruled that the amendment violated due process protections in that it was not rationally related to a legitimate state goal because it was both too narrow and too broad by identifying individuals with a particular trait and denying them broad-range protections. The Court found the amendment deprived gay and lesbian couples of the ability to participate in the democratic process by forever banning them from attaining any protection of any sort in the public workplace. The same concerns apply in this case, and as such, this Court should avoid any construction of Michigan's Marriage Amendment which would run contrary to the protections of the equal protection clause.

Finally, Article I, §10 of the Michigan Constitution prohibits bills of attainder, which are legislative or constitutional acts that impose a punishment on an identifiable group of citizens without benefit of a judicial trial. *Michigan State AFL-CIO v Employment Relations Com'n*, 453 Mich 362; 551 NW2d 165 (1996) (see concurrence of Justice Mallett). The United States Supreme Court overturned a law which made it a crime for a member of the Communist Party to hold office in a labor organization,

indicating the law amounted to an impermissible bill of attainder. *United States v Brown*, 381 US 437; 85 SCt 1707; 14 LEd2d 484 (1965). In *Brown* at 450, the Court found that the statute "designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability--members of the Communist Party." In the instant case, construction of the Marriage Amendment in the manner recommended by Plaintiffs-Appellants makes gay and lesbian couples "the persons who possess the feared characteristics" leading to their inability to secure work place protections, such as domestic partner health benefits, in the public sector.

CONCLUSION

Because the instant case is about standing, not the DOMA and certainly not the Marriage Amendment, this Court should decline to review the merits of the underlying matter. Other cases currently being litigated are better poised to establish the needed record and address the appropriate issues and challenges related to the Marriage Amendment, so there is no necessity to take those matters up here and now. It is evident that the amendment faces considerable legal hurdles which threaten its very viability if interpreted as Plaintiffs-Appellants propose. However, to pursue this line of challenge, Plaintiffs-Appellants should cure their defects and re-file their case to add this claim.

RELIEF REQUESTED

WHEREFORE, Intervening Defendant-Appellee, the Ann Arbor Education Association, MEA/NEA, respectfully requests that this Court deny Plaintiffs-Appellants' Application for Leave to Appeal.

Respectfully Submitted,

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